Supreme Court, U.S.
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**CASE NO.**

**THE UNITED STATES SUPREME COURT**

**1995/1996 Term**

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**Grant Reynolds and the Estate of**
**Dale C. Eckert Corporation, in Bankruptcy**
***Petitioners***

**v.**

**Philip Wagner and William Simon**
***Respondents***

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**Petition for Writ of Certiorari to**
**the United States Court of Appeals**
**for the Ninth Circuit**

# PETITION FOR WRIT OF CERTIORARI

**William McKinnon**
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43 pp

## I. QUESTION PRESENTED FOR REVIEW

Are district courts permitted by *Federal Rule of Appellate Procedure 4 (a)(5)* to grant additional time for filing a notice of appeal for "good cause" if leave is sought between the thirty-first and sixtieth day following entry of judgment?

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## IV. REPORTS AND OPINIONS

On October 28, 1995 the United States District Court , Central District of California, Judge Gary S. Taylor presiding, granted Petitioners' motion for an extension of time to file a notice of appeal. The motion and decision was based on Petitioners' representation that "good cause" existed for the extension of time.

On May 26, 1995 the Ninth Circuit Court of Appeals, Northern District of California, held that a finding of "good cause" under *Federal Rule of Appellate Procedure 4 (a)(5)* was only applicable to applications for an extension of time filed on or before the thirtieth day, that is to say before the original time to file the notice had run.

A petition for reconsideration and a suggestion for rehearing *en banc* denied without comment.

## V. BASIS OF JURISDICTION

This writ concerns a decision of the Ninth Circuit Court of Appeals made May 26, 1995. Jurisdiction is believed conferred upon this Court by *United States Supreme Court Rule 10.1 (a)*, in that the decision rendered is in direct conflict with decisions of other United States courts of appeal on the same matter.

Jurisdiction was conferred upon the Ninth Circuit in the underlying matter when appeal was taken as a matter of right pursuant to *Federal Rule of Appellate Procedure 4.*

## VI. PETITION FOR WRIT OF CERTIORARI

### A. Introduction

Grant Reynolds and the Estate of Dale C. Eckert Corporation ("Petitioners") hereby petition for a writ of certiorari in respect to the decision of the Ninth Circuit Court of Appeal, Northern District of California, filed May 26, 1995. This petition asks that this Court consider the interpretation of *Federal Rule of Appellate Procedure ("FRAP") 4 (a)(5),* which reads as follows:

> **The district court, upon a showing or excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by this Rule 4(a).** Notice of any such motion which is filed after expiration of the proscribed time shall be given to the other parties in accordance with local rules. No such extension shall exceed 30 days past such proscribed time or 10 days from the date of entry of the order granting the motion, whichever occurs later. (emphasis added)

The decision, appended hereto as *Exhibit A*, stated in relevant part (at page 5780): "This court has applied the good cause standard on to extension motions filed within the initial thirty-

day appeal period following judgment. When a motion for extension of time to appeal is filed, as here, *after* the expiration of such thirty-day period, the appropriate standard for extension of the filing period is 'excusable neglect.'"

The Court relied upon *Oregon v. Champion Int'l Corp.* 680 F.2d 1300 (9th Cir. 1982).

The Court did not address apparently contradictory statements contained in other Ninth Circuit cases. *Olson v. National Broadcasting Co. Inc. 855 F.2d 1446, 1453* (9th Cir. 1988) stated that " ... the district court **'upon a showing of good cause *or* excusable neglect'** may within thirty days after the expiration of the time for filing extend the time for filing a notice of appeal ... " (emphasis added) See also *Pratt v. McCarthy* 850 F.2d 590 (9th Cir. 1988).

Further, the Court did not acknowledge considerable authority in other districts which have expressly rejected the holding of *Oregon*, or independently arrived at a wholly different interpretation of the statute. These include *Scarpa v. Murphy* 782 F.2d 300 (1st Cir. 1986), *Pontarelli v. Stone* 930 F.2d 104 (1st Cir. 1991), *Weekley v. Jones* 927 F.2d 382, 386 (8th Cir. 1991) and *Cyrak v. Lemon* 919 F.2d 320 (5th Cir. 1990) and others set forth herein.

## B. The principle of "plain reading"

The process of statutory interpretation begins with an analysis of the statute's language. *Mallard v. United States District Court for the Southern District of Iowa* 109 S.Ct. 1814, 104 L.Ed.2d 318 (1989). As Justice Holms has said: "we do not inquire what the legislature meant; we ask only what the statute means." [1] "[W]e must interpret the statute as written." *Wadsworth v. Whatland* 562 F.2d 70 (1st Cir. 1977). "Courts properly assume, absent sufficient indication to the contrary, that Congress intends the words in its enactments to carry 'their ordinary, contemporary, common meaning.' [citation omitted]" *Pioneer Inv. Servs. Co. v. Brunswick Assoc. Ltd. Partnership* 113 S.Ct. 1489 (1993).

> If the words are plain, they give meaning to the act, and it is neither the duty or the privilege of the courts to enter speculative fields in search of a different meaning. Reports to congress accompanying the introduction of proposed laws may aid the courts in reaching the true meaning of the legislature in cases of doubtful interpretation ... (citations omitted) ...

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1 Holmes, *Collected Legal Papers*, P. 207 (New York, 1920), cited with approval in *Statutes and Statutory Construction*, Singer, 4th Ed., Vol. 2A, p. 30

> [W]hen words are free from doubt they must be taken as the final expression of the legislative intent, and are not to be added to or subtracted from by consideration drawn from ... reports accompanying their introduction, or from any extraneous source. In other words, the language being plain, and not leading to absurd or wholly impracticable consequences, it is the sole evidence of the ultimate legislative intent. *Caminetti v. United States* 37 S. Ct. 192, 196 (1913)[2]

### C. The *Oregon* court's error in interpretation

The facts of *Oregon* were simple. Through apparent inadvertence or clerical error the notice of appeal was mailed to the state rather than district court. Applying the then existent standard that "excusable neglect" could be found only when the error was attributable to someone other than a party or its counsel, the majority of the court held that the neglect was inexcusable. Thus the *ratio* of *Oregon* is that a party could not be excused from

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2 Cited in, among many others, *Hill v. U.S.* 720 F.Supp. 95 (W.D. Mich. 1989)

clerical error for which they were responsible. *Pioneer* has subsequently directed the courts to apply a more lenient standard.

A dissenting opinion took exception with the strict interpretation of "excusable neglect," however neither the majority nor dissenting opinion addressed the more fundamental principle of plain reading forming the foundation for statutory interpretation.

Without preamble or explanation of the ambiguity that it felt necessary to interpret, the *Oregon* court majority opinion incorporated into the plain reading of the statute a portion of the *FRAP 4(a)(5)* Committee Note:

> The proposed [adopted] amended rule expands to some extent the standard for the grant of an extension of time. The present rule [former subdivision (a)(5)] requires a "showing of excusable neglect." While this was an appropriate standard in cases in which the motion is made after the time for filing the notice of appeal has run, and remains so, it has never fit exactly the situation in which the appellant seeks an extension before the expiration of the initial time. In such a case "good cause," which is the standard that is applied in the granting of other extensions of time under Rule 26(b) seems more appropriate.

It is respectfully submitted that, in so doing, the majority in *Oregon* made unnecessary and therefore incorrect referral to extrinsic material. The record does not reflect a request for rehearing.

The statute clearly provides that the district court is authorized to consider either one of two alternatives in deciding whether to grant an extension of time: "upon a showing of excusable neglect ***or*** good cause..." (emphasis added) "Or" is defined by the venerable *Black's Law Dictionary* (5th. Ed., 1979) as "a disjunctive particle used to express an alternative or to give a choice of one among two or more things."

The Committee Note is substantially different than the plain language of the statute, providing that one standard (good cause) be applied before the expiration of the time to file notice, and another (excusable neglect) thereafter. While the dichotomy

proposed by the Committee Note is not unprecedented,[3] on a plain language reading the statute does not contain two separate standards. While the courts often, and properly, refer to the Committee Notes to construe ambiguities in statutes, in this instance the result has been to elevate the committee note above the plain wording of the statute.

This point has not been directly considered by the Supreme Court, however was tangentially addressed in *Pan-Islamic Trade Corporation v. Exxon Corporation* 102 S.Ct. 427. The majority

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3 See for comparison *Federal Rule of Civil Procedure 6 (b)* which states in part:

**(b) Enlargement.** When by theses rules or by a notice given thereunder or by order of court an act is required or allowed to be done within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefore is made before the expiration of the period originally proscribed or as extended by previous order, or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect ...

denied a petition for a writ of certiorari, however Justice Rehnquist wrote a dissenting opinion.

The question in *Pan-Islamic Trade Corp.* was whether an appellant could rely upon the district court's ill-founded opinion that a "motion to reconsider" tolled the time to find a notice of appeal. The majority of the Court, by denying the petition, sustained the Seventh Circuit's opinion that the reliance fell into the "reliance on a judicial officer" exception to the 30 day notice filing requirement.

In his dissent Justice Rehnquist did not address *Oregon*, however his comments regarding *FRAP 4(a)(5)* are illuminating. It is evident that he considered the statute clear in its meaning.

> The barrier of the 30-day rule is not impenetrable, however, for the Rules provide that the District Court may, "upon a showing of excusable neglect or good cause" extend the time for filing a notice of appeal. Fed.Rule App.Proc. 4(a)(5). ... Respondent could have made such a request up to 60 days after the District Court had initially denied respondent's post-trial motion.

"We are not at liberty to construe language so plain as to

need no construction, or to refer to committee reports where there can be no doubt of the meaning of the words used." *Helvering v. City Bank Farmers Trust Co.* 56 S.Ct. 70 (1935). "In proper cases, such reports are given consideration in determining the meaning of a statute, but only where that meaning is doubtful. They cannot be resorted to for the purpose of construing a statute contrary to the natural import of its terms. ... 'If the language be clear it is conclusive. There can be no construction where there is nothing to construe.'" *United States v. Shreveport Grain & Elevator Co.* 53 S.Ct. 42 (1932).

> It is an elementary and indeed cardinal rule of statutory construction that where a statute uses plain and unambiguous words, courts are not justified in changing the wording to meet particular situations, even where it might be thought that the legislative body might have changed the words, if the particular subsequently arising contingency had been then in contemplation. *Moncrief v. Hobby* 133 F.Supp. 152

**D. "Good cause" and "excusable neglect"**

That is not to say that the statute is without ambiguity. Some commentators have referred to the continuum between "cause" through "good cause" to "excusable neglect" as being similar to Mohr's Table of Hardness: calcite is harder than talc, but softer than gypsum. Similarly "good cause" is harder than"cause" but softer than "excusable neglect."

Others have taken a contrary view:

> As an original matter we might think it so much hairsplitting to try to distinguish excusable neglect from good cause, or even that, if the hairs must be split, excusable neglect connotes a laxer standard than good cause. "Excusable" is not as meritorious as "good" (compare the distinction in criminal law between justifiable and excusable homicide), or "neglect" as "cause." *Lorenzen v. Emp. Ret. Plan of Sperry & Hutchinson* 896 F.2d 228 (7th Cir. 1990)

The definition of "excusable neglect" is an uncertain and evolving standard. Had the *Oregon* court turned to the Committee Note to resolve the ambiguity of "good cause" or "excusable neglect" it would not have been an error. Prior to *Pioneer*, the

courts considered themselves obliged to "interpret the excusable neglect standard narrowly." *Pearson v. Gatto* 933 F.2d 521 (7th Cir. 1991). In *650 Park Ave. Corp. v. McRae* 836 F.2d 764 (2nd Cir. 1988) it was held that excusable neglect results only "from the acts of someone other than the appellant or his or her attorney or from events otherwise beyond their control."

Excusable neglect is now described by the Supreme Court as "a somewhat 'elastic concept' ... not limited strictly to omissions caused by circumstances beyond the control of the movant ... [W]e conclude that the determination is at bottom an equitable one, taking into account of all relevant circumstances surrounding the party's omission." *Pioneer, 1496-98*

It is this judicial evolution on which the Ninth Circuit founded its decision in this matter. With respect, while petitioners concur with the opinion insofar as it states that *Pioneer* has opened the door to a more liberal interpretation of excusable neglect, it is submitted that good cause is an equally valid basis on which to

found the extension of time pursuant to *FRAP 4(a)(5)*.

The statute clearly offers two alternative foundations on which the district court can extend time. There is no *statutory* justification for elimination of one. By focusing on the definition of "excusable neglect" this Court has followed in the ill-placed footsteps of *Oregon*, and, respectfully, is engaging in constitutionally improper judicial creation of law contrary to the clear intent of Congress.

*FRAP 4(a)(5)* offers two alternatives, either of which is limited by two boundaries of time. The motion cannot be brought before entry of judgment, or later than 60 days following entry. If brought in the first 30 days, the motion can be *ex parte*, if brought in the second 30 days, if must be a noticed motion. The district court must use its sound discretion to decide whether either good cause or excusable neglect is shown. There is no uncertainty in the statute.

By incorporation of the Committee Note the *Oregon* court,

and those that have followed its course, have created, not resolved, ambiguity. The elasticity of "excusable neglect" has at times been stretched beyond reasonable limits, as the courts, faced with a good cause for extension, but limited by *Oregon*, have struggled to cover the facts and justice of the moment.

Courts have found "good cause," then performed the alchemy necessary to hold it "excusable neglect." For example see *United States v. Roberts* 749 F.2d 404, 408-409 (1984): "Where there is good reason for allowing an extension ... we are not obliged to insist on perfect compliance ... we are inclined to take a practical view in assessing whether he has satisfied the filing requirement ...[and] consider the acceptance of the notice of appeal by the district court to be tantamount to a finding of excusable neglect."

Some courts have held themselves bound to follow *Oregon*, yet nevertheless have sought equity. For example, the courts have held the misdirection of mail to be neglect, in some instances excusable, in others inexcusable. In *Oregon* the court held that the

misaddressing by a secretary to the state court rather than the federal court was inexcusable. In *Ramsuer v. Beyer* 921 F.2d 504 (3rd Cir. 1990) the court found it excusable neglect when a notice was not delivered by the post office for thirteen days after its mailing. [4]

### E. Decisions Which Contradict *Oregon*

Where the courts have not held themselves bound by *Oregon*, but rather have applied the discretion granted by *FRAP 4(a)(5)*, the intellectual gymnastics appear less tortured. Compare *Ramsuer* with *Scarpa*, wherein the court considered an analogous situation of a letter taking five days to be delivered three miles. Granting the extension, the court stated:

> We regard the *Oregon* court's statement that the phrase 'good cause' is applicable only when the motion is filed

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[4] See also *Gibbs v. Town of Frisco City* 626 F.2d 1218 (5th Cir. 1980) and *U.S. v. Twomey* 845 F.2d 1132 (1st Cir. 1988)

> before the time for filing the appeal has expired ... as an unwarranted maiming of the rule ... The rule expressly recognizes 'good cause' as a basis for extension before and after the appeal time. There was no mistake by counsel, excusable or otherwise. *Scapa, 301*

Courts of appeal in both the Ninth Circuit and other circuits have rejected or ignored *Oregon's* view of the statute, literally applying the alternative conditions set forth in the statute. The result has become confusion in the law.

For example the Ninth Circuit has stated: "The district court may extend the appropriate time period set out in Rule 4(a)(1) 'if two requirements are met: (1) the motion for the extension is filed no later than 30 days after the expiration of the original appeal period; and (2) the moving party makes a sufficient showing of 'excusable neglect or good cause' for not meaning the original deadline. Fed.R. App. P. 4(a)(5).'" *Pratt,* 592 citing *Alaska Limestone Corp. v. Hodel* 799 F.2d 1409, 1411 (9th Cir. 1986)

In *Wright v. Deyton* 757 F.2d 1253 (11th Cir. 1985) it was stated that both good cause and excusable neglect were available to

the district court in determining whether to grant an extension.

"Given we find at least some evidence in the record suggesting good cause or excusable neglect ... we cannot conclude the district court abused its discretion." *Weekley*, 386

Holding that the requirement for a noticed motion in *FRAP 4(a)(5)* is mandatory, *Pryor v. Marshall* 711 F.2d 63, 65 (6th. Cir. 1983) stated: "A late notice of appeal which fails to allege excusable neglect ***or good cause*** can no longer serve as a substitute ... Although the district court has the power to extend the time for filing a notice of appeal, such an extension is contingent upon the showing of excusable neglect ***or good cause*** made by motion not later than 30 days after the expiration of the original 30 period..." (emphasis added)

In *Cyrak v. Lemon* 919 F.2d 320 (5th Cir. 1990) the thirtieth day following entry was April 14, 1989. On May 15, 1989 one appellant filed a motion for an extension of time to file an

appeal. It was granted for "good cause" and the court of appeal found that it obtained jurisdiction from the subsequent filing.

"Extensions of this jurisdictional requirement [to file a notice of appeal] are allowed only in cases of 'excusable neglect' or 'good cause' and any extension must not exceed 30 days from the original filing date." *Buggs v. Elgin, Joliet & Eastern Ry. Co.* 852 F.2d 318 (7th Cir. 1988)

Perhaps the most straightforward challenge to the reasoning of *Oregon* has been mounted by the First Circuit's decision in *Pontarelli.* Citing *Scarpa*, the court stated:

> [T]he language of *FRAP 4(a)(5)* itself, which could hardly be clearer, in no way intimates that "good cause" is to be utilized exclusively in the evaluation of *FRAP 4(a)(5)* requests submitted within the thirty day period for lodging an appeal as a matter of right ...
>
> We explore the plain language of the amended rule for further delineation of the appropriate scope of any "good cause" analysis in the circumstances of the present case. The search is assisted by the interpretive precept that the language of the amended rule should be ascribed no meaning that would render any part of it superfluous ...

> The plain language of the amended rule "expressly recognizes 'good cause' as a basis for extension both before and after the expiration of the appeal time" [citation omitted]...
>
> No less significantly, the original "excusable neglect" standard, whose customary scope remains unlimited under the scope of the amended rule, would be pared by gratuitous interpretation if the amendatory "good cause" analysis were not confined to circumstances unsuited to the traditional "excusable neglect" analysis.

## VII. CONCLUSION

For the foregoing reasons it is respectfully requested that this Court grant a writ of certiorari to review the subject decision and provide determinative and uniform guidance to the courts of appeal and to practitioners on the proper application of the "excusable neglect" and "good cause" standards of *FRAP 4(a)(5)*.

The courts of appeal are clearly divided on this matter, with the First, Fifth, Sixth, Seventh, Eighth and Eleventh Circuits having rendered decisions clearly contradicting the holding of the Ninth Circuit in *Oregon*.

Respectfully submitted August 23, 1995.

THE LAW OFFICE OF WILLIAM McKINNON

_____

William McKinnon
Counsel for Petitioners
Grant Reynolds and
Estate of Dale C. Eckert Corporation

## VIII. APPENDIX OF OPINIONS AND ORDERS

Decision of the Ninth Circuit Court of Appeals
May 26, 1995

Order of the United States District Court
October 28, 1995

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. SA CV 91-395 GLT Date 10/28/93

Title REYNOLDS, ET AL. V. PHILIP B. WAGNER & WILLIAM SIMON

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DOCKET ENTRY:

I hereby certify that this document was served by first class mail, postage prepaid, to all counsel for parties at their respective most recent address of record in this action on this date;
date 10/28/93
R. Walters
Deputy Clerk

---

PRESENT:

HON. Gary L. Taylor JUDGE

Robert Bolton
Deputy Clerk

None Present
Court Reporter (RAW)

ATTORNEYS PRESENT FOR PLAINTIFFS:

None Present

ATTORNEYS PRESENT FOR DEFENDANTS:

None Present

PROCEEDINGS: ORDER GRANTING PLAINTIFFS' MOTION FOR EXTENSION OF TIME TO FILE NOTICE OF APPEAL

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Plaintiffs' Motion for Extension of Time for Filing Notice of Appeal is GRANTED, and Plaintiffs may file their Notice of Appeal no later than November 15, 1993. Plaintiffs should consult Local Rule 17 and the Clerk of the Court regarding fees and procedures for filing their Notice.

The matter is taken off calendar for November 1, 1993.

Initials of Deputy Clerk RW

**FOR PUBLICATION**

# UNITED STATES COURT OF APPEALS
# FOR THE NINTH CIRCUIT

GRANT REYNOLDS, and THE ESTATE OF DALE C. ECKERT CORPORATION,
*Plaintiffs-Appellants,*
v.
PHILIP B. WAGNER; WILLIAM SIMON,
*Defendants-Appellees.*

No. 93-56629
D.C. No.
CV-91-00395-GLT
OPINION

Appeal from the United States District Court
for the Central District of California
Gary L. Taylor, District Judge, Presiding

Submitted April 3, 1995*
Pasadena, California

Filed May 26, 1995

Before: John T. Noonan, Jr., Diarmuid F. O'Scannlain, and Edward Leavy, Circuit Judges.

Opinion by Judge O'Scannlain

*The panel unanimously finds this case suitable for submission on the record and briefs and without oral argument. Fed. R. App. P. 34(a), Ninth Circuit R. 34-4.

## SUMMARY

**Civil Litigation and Procedure/Appeals – Procedure/ Appeals – Jurisdiction**

The court of appeals remanded a case. The court held that remand was warranted so that the district court could make a finding as to whether appellants' explanation for failing to timely file a notice of appeal met the Supreme Court's standard for "excusable neglect."

Dale C. Eckert Corp., a general contractor, entered into a construction contract with Orange Tree Associates, a developer. Pursuant to the contract, Eckert was to construct a condominium complex for which Orange Tree was to pay. Orange Tree funded the project by borrowing money from State Savings and Loan Association, secured by a first lien on the real property. State Savings became insolvent, and the Federal Savings and Loan Insurance Corp. (FSLIC) was appointed as a receiver. The FSLIC chartered New West Federal Savings and Loan Association as a successor entity. New West acquired the note on the Orange Tree project.

Prior to the project's completion, Orange Tree filed a petition in bankruptcy under Chapter 11. Orange Tree's principal creditors were New West and Eckert, which held a mechanics lien. The amount due New West, which had a priority lien on the real property, far exceeded the project's value.

Eckert filed for bankruptcy. Appellee Philip Wagner was appointed as trustee for the Eckert estate. Appellee William Simon was appointed as attorney for Wagner in his capacity as trustee. Wagner agreed to exchange Eckert's disputed, secured claim for an undisputed, unsecured claim of a lesser amount.

Appellant Grant Reynolds, a subcontractor on the project, was one of Eckert's major creditors. Dissatisfied both with the

Orange Tree reorganization plan and with the proposed compromise, Reynolds advised Wagner of his theory that New West was a joint venturer on the project and thus could not also be the senior lienholder. Wagner rejected Reynolds' advice, electing not to challenge New West's claim.

Special counsel for the Eckert estate brought an action in bankruptcy court seeking to overturn the Orange Tree reorganization plan. The court held that the limitations period for seeking a revocation of the reorganization plan had lapsed, and dismissed Eckert's claim as untimely. The Bankruptcy Appellate Panel and the court of appeals affirmed.

Reynolds and the Eckert estate filed an action against Wagner and Simon, alleging that they had been negligent in failing to pursue Eckert's claims against Orange Tree. The district court granted Wagner's and Simon's motions for summary judgment.

Reynolds and Eckert failed to file an appeal within 30 days of the entry of summary judgment in favor of Wagner and Simon. Instead, three days after the time to appeal had expired, Reynolds and Eckert filed a Motion for Extension of Time for Filing Notice of Appeal. In explanation of the delay, counsel for the Eckert estate stated that he had failed to make contact with the Eckert trustee in the 30 days following the entry of judgment, and thus was unsure whether to proceed with the appeal. The district court granted the motion for an extension of time.

[1] In *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. Partnership*, 113 S. Ct. 1489 (1993), the Supreme Court held that attorney negligence may, in certain circumstances, constitute "excusable neglect," considerably liberalizing its meaning and prescribing a new analytical test. [2] Although the Court in *Pioneer Investment Services* explored the meaning of "excusable neglect" within the context of a federal rule of bankruptcy procedure, *Pioneer Investment Services* was appli-

cable in this case. [3] "Excusable neglect" in the context of Fed. R. App. P. 4(a)(5) has the same meaning as the Court determined in the Bankruptcy Rules context. Accordingly, the case was remanded to the district court for a finding whether Reynolds' and Eckert's explanation met the *Pioneer Investment Services* standard.

## COUNSEL

William McKinnon, Sausalito, California, for the plaintiffs-appellants.

Stuart K. Lesansky, Charlston, Revich & Williams, Los Angeles, California, for defendant-appellee Wagner.

Stephen T. Hodge, Wehner and Perlman, Los Angeles, California, for defendant-appellee Simon.

## OPINION

O'SCANNLAIN, Circuit Judge:

What constitutes "excusable neglect" when the appellant fails to file a notice of appeal on time? We must interpret what the Supreme Court did *not* say in a recent case.

### I

In 1982, the Dale C. Eckert Corporation ("Eckert"), a general contractor, entered into a construction contract with Orange Tree Associates, a developer. Pursuant to that contract, Eckert was to construct a 100-unit condominium complex in Long Beach, California, for which Orange Tree was to pay it $5.3 million. Orange Tree funded the project by borrowing $10.56 million from State Savings and Loan Association, secured by a first lien on the real property.

State Savings ultimately became insolvent. In September 1988, the Federal Savings and Loan Insurance Corporation ("FSLIC") was appointed as a receiver for the defunct institution. The FSLIC chartered New West Federal Savings and Loan Association ("New West") as a successor entity.[1] New West acquired the note on the Orange Tree project.

In April 1985, prior to the project's completion, Orange Tree filed a petition in bankruptcy under Chapter 11. Orange Tree's principal creditors were New West and Eckert, which held a $765,763 mechanics lien. Because the amount due New West, which had a priority lien on the real property, far exceeded the project's value. Eckert's claim was rendered virtually worthless.[2]

In March 1986, Eckert itself filed for bankruptcy. Philip Wagner was appointed as trustee for the Eckert estate. One year later, William Simon was appointed as attorney for Wagner in his capacity as trustee for the estate.

Recognizing that Eckert's interest was subordinate to the secured lien of the bank, which was likely to account for all of Orange Tree's assets, Wagner agreed to exchange Eckert's disputed, secured claim of $765,763 for an undisputed, unsecured claim of $75,000. Orange Tree had proposed a reorganization plan under which unsecured creditors would be paid approximately ten cents on the dollar. Under this plan, Eckert would realize about $7,500 in satisfaction of its claim.[3]

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[1]The remainder of this opinion will not distinguish between New West and its predecessor-in-interest, but instead will refer to the institution as New West.

[2]The value of Eckert's claim was further diminished by the fact that Orange Tree disputed it.

[3]The bankruptcy court approved the Orange Tree reorganization plan in June 1988. Wagner voted for the plan.

Appellant Grant Reynolds, a subcontractor on the Long Beach project, was one of Eckert's major creditors. Dissatisfied both with the Orange Tree reorganization plan and with the proposed compromise, Reynolds advised Wagner of his theory that New West was a joint venturer on the Long Beah project and thus could not also be the senior lienholder. If Wagner could successfully demonstrate a joint venture, Reynolds contended, New West's deed of trust would be set aside and Eckert could collect all of its claim. Wagner rejected Reynolds' advice, electing not to challenge New West's claim.

In September 1988, Wagner and Orange Tree filed a joint motion in Eckert's bankruptcy proceeding seeking approval of the compromise of Eckert's claim. Reynolds appeared at this hearing, and raised his objections. Further, Reynolds offered to pay the estate more than the $7,500 it would receive from the compromise and to hire special counsel to pursue Eckert's claim against Orange Tree. The court accepted Reynolds' offer. In addition, the court permitted Wagner to resign as trustee, and appointed a new trustee for the estate.

Special counsel for the Eckert estate then brought an action in bankruptcy court in March 1989, seeking to overturn the Orange Tree reorganization plan. The court held that the limitations period for seeking a revocation of the reorganization plan had lapsed, and dismissed Eckert's claim as untimely. The Bankruptcy Appellate Panel affirmed on this ground, as did this court. *See In re Orange Tree Assocs. Ltd.*, 961 F.2d 1445 (9th Cir. 1992).

Reynolds and the Eckert estate thereafter filed the claims in this action against Wagner and Simon, alleging that they had been negligent in failing to pursue Eckert's claims against Orange Tree. Both Wagner and Simon filed motions for summary judgment which the district court granted, reasoning that they could not have recovered in the Orange Tree bankruptcy proceedings because of the primary lien of New West Bank,

and because the doctrine enunciated in *D'Oench Duhme & Co. v. FDIC*, 315 U.S. 447 (1942) barred any claims that could have been asserted to challenge the lien. Reynolds and Eckert appealed.[4]

II

Before we may consider the merits of this appeal, however, we have a controlling threshold jurisdictional issue. A brief overview of the procedural history of this appeal is necessary to sort it out.

A

The district court entered summary judgment in favor of Wagner and Simon on September 1, 1993. Pursuant to Rule 4(a)(1) of the Federal Rules of Appellate Procedure, Reynolds and Eckert had thirty days in which to file an appeal — that is, until Friday, October 1, 1993 — which they failed to do. Instead, on Monday, October 4, 1993, three days after the time to appeal had expired, Reynolds and Eckert filed a

[4]As an initial matter, we consider Wagner's and Simon's contention that Reynolds is not properly before this court as an appellant. The first sentence of the Notice of Appeal filed in this case states: "NOTICE IS HEREBY GIVEN that Plaintiff Estate of Dale C. Eckert Corporation, above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the judgment entered in this action on September 1, 1993." Because Reynolds is not mentioned, Wagner and Simon argue, he cannot be considered a party to this appeal. To support their argument, Wagner and Simon cite Rule 3(c) of the Federal Rules of Appellate Procedure, which requires that all parties to an appeal be properly named.

Wagner and Simon are correct in arguing that all parties to an appeal must be clearly identified in the notice of appeal. However, Wagner and Simon fail to note that Grant Reynolds is named in the caption of the Notice of Appeal. Rule 3(c), upon which Wagner and Simon rely, expressly states that: "A notice of appeal must specify the party or parties taking the appeal by naming each appellant *in either the caption or the body of the notice of appeal*." (emphasis added). Because Reynolds is named in the caption, he is properly before this court as an appellant.

Motion for Extension of Time for Filing Notice of Appeal pursuant to Rule 4(a)(5) of the Federal Rules of Appellate Procedure. In explanation of the delay, counsel for the Eckert estate stated that he had failed to make contact with the Eckert trustee in the thirty days following the entry of judgment, and thus was unsure whether to proceed with the appeal. Counsel gave no reason for his inability to meet with the trustee; instead, he stated simply that "[a]lthough both [counsel for the trustee] and I have tried to make contact on several occasions, to this date we have been unable to schedule a meeting wherein he and I could meet with the trustee and obtain his instruction regarding appeal." Without explanation, the district court granted the motion for an extension of time.

Rule 4(a)(5) provides that "[t]he district court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by this Rule 4(a)." This court has applied the good cause standard only to extension motions filed within the initial thirty-day appeal period following judgment. When a motion for extension of time to appeal is filed, as here, *after* the expiration of such thirty-day period, the appropriate standard for extension of the filing period is "excusable neglect." *See Oregon v. Champion Int'l Corp.*, 680 F.2d 1300, 1301 (9th Cir. 1982).

Traditionally, this court has viewed excusable neglect through a narrow lens, finding the standard satisfied only in "extraordinary cases where injustice would otherwise result." *Id.* at 1301; *see also Alaska Limestone Corp. v. Hodel*, 799 F.2d 1409, 1411 (9th Cir. 1986) ("Inadvertence or mistake of counsel . . . does not constitute excusable neglect under this standard."). Noting this, Wagner and Simon contend that the explanation given by Eckert's counsel does not rise to the level of excusable neglect, and thus that we must dismiss for lack of jurisdiction.[5]

[5]Wagner and Simon presented this argument to a motions panel of this court, seeking the dismissal of this appeal. The panel denied the motion.

B

[1] We share Wagner's and Simon's jurisdictional concerns. However, we are troubled not because we believe Reynolds and Eckert have failed to show excusable neglect under this court's stringent definition, but rather because the Supreme Court appears to have just changed the rules. *See Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. Partnership*, 113 S. Ct. 1489 (1993). In *Pioneer Investment Services*, the Supreme Court held that attorney negligence may, in certain circumstances, constitute "excusable neglect," considerably liberalizing its meaning and prescribing a new analytical test.

In defining the phrase, the Court first noted that Congress "intends the words in its enactments to carry their ordinary, contemporary, common meaning." *Id.* at 1495 (quotations omitted). By using the word "neglect," the Court explained, "Congress plainly contemplated that the courts would be permitted, where appropriate, to accept late filings caused by inadvertence, mistake or carelessness . . . ." *Id.* The determination of whether such neglect is "excusable," the Court concluded, "at bottom is an equitable one, taking account of all relevant circumstances surrounding the party's omission" — circumstances which include the risk of prejudice to the nonmoving party, the extent of the delay, and its potential effect on judicial proceedings, the reason for the delay and whether the moving party acted in good faith.

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Wagner and Simon then filed a motion for reconsideration, which the motions panel denied in part. However, the panel granted the motion to the following extent: "The question of whether the district court abused its discretion in extending the time to file a notice of appeal based exclusively on good cause is referred to the panel considering this appeal on its merits." Accordingly, we are free to review Wagner's and Simon's jurisdictional claim. Further, "the fact that the motions panel denied [appellees'] motion to dismiss this appeal does not free this court from the independent duty to decide whether we have jurisdiction." *United States v. Houser*, 804 F.2d 565, 568 (9th Cir. 1986) (quotations omitted).

[2] We recognize that the Court in *Pioneer Investment Services* explored the meaning of "excusable neglect" within the context of Rule 9006(b)(1) of the Federal Rules of Bankruptcy Procedure, the provision governing late filings in bankruptcy court.[6] *See In re Dix*, 95 B.R. 134, 137-38 (Bankr. 9th Cir. 1988) (distinguishing between excusable neglect as used in Bankruptcy Rules and excusable neglect as used in Rule 4(a)). Nonetheless, we are persuaded that *Pioneer Investment Services* is applicable to the case before us. "Because the Court's analysis of what constitutes 'excusable neglect' in the bankruptcy context rested on the plain meaning of the terms, there is no reason that the meaning would be different in the context of Fed. R. App. P. 4(a)(5)." *City of Chanute, Kansas v. Williams Nat. Gas Co.*, 31 F.3d 1041, 1046 (10th Cir. 1994), *cert. denied*, 115 S. Ct. 1254 (1995); *see also United States v. Hooper*, 9 F.3d 257, 259 (2d Cir. 1993) (applying *Pioneer Inv. Servs.* in context of Fed. R. App. P. 4(b)).

Further, the Court's opinion draws upon the use of the term "excusable neglect" in several other federal rules. *See Pioneer Inv. Servs.*, 113 S. Ct. at 1496 & n.9 (interpreting "excusable neglect" in context of Rule 6(b) of the Federal Rules of Civil Procedure and of Rule 45(b) of the Federal Rules of Criminal Procedure); *id.* at 1497 (interpreting use of term in context of Rules 13(f) and 60(b)(1) of Federal Rules of Civil Procedure). This suggests to us that the Court's definition extends beyond the limited parameters of Rule 9006(b)(1).

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[6]Bankruptcy Rule 9006(b) provides:

> (1) *In General.* Except as provided in paragraphs (2) and (3) of this subdivision, when an act is required or allowed to be done at or within a specified period by these rules or by a notice given thereunder or by any order of court, the court for cause shown may at any time in its discretion . . . (2) on motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect.

[3] We are persuaded that "excusable neglect" in the context of Rule 4(a)(5) has the same meaning as the Supreme Court recently determined in the Bankruptcy Rules context. Accordingly, we remand this case to the district court for a finding whether Reynolds' and Eckert's explanation meets the *Pioneer Investment Services* standard.

REMANDED.

## IX. COUNSEL OF RECORD

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## X. PROOF OF SERVICE BY MAIL

**United States Supreme Court**

Grant Reynolds and the Estate of
Dale C. Eckert Corporation, Petitioners
v.
Philip B. Wagner and William Simon, Respondents

Supreme Court No. _____
Court of Appeal No. 93-56629
U.S. Dist. Crt. No. SACV 91-395 GLT (RWRX)

I declare that I am employed in the County of Marin, California. I am over the age of eighteen (18) years and not a party to this action. My business address is 68 Leveroni Court, Novato, CA 94949

On August 23, 1995 I served the attached **PETITION FOR WRIT OF CERTIORARI** by placing a true copy in an envelope and depositing it with the United States Postal Service for collection and delivery this date addressed as follows:

Stuart Lesansky, Esq.
Lesansky & Associates
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Suite 700
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Suite 800
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Executed on August 23, 1995 at Bel Marin Keys, California.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

_____

Carolyn J. Thompson

Supreme Court, U.S.
FILED
SEP 28 1995
CLERK

(2)

No. 95-320

In The

# Supreme Court of the United States

October Term, 1995

GRANT REYNOLDS AND THE ESTATE OF DALE C. ECKERT CORPORATION, IN BANKRUPTCY,

*Petitioners,*

vs.

PHILIP WAGNER AND WILLIAM SIMON,

*Respondents.*

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

## OPPOSITION BRIEF OF RESPONDENT WILLIAM SIMON

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45 pp

## QUESTIONS PRESENTED

1. Whether Petitioners have demonstrated any special and important reason for the granting of their Petition when the language of Federal Rule of Appellate Procedure 4(a)(5) and the accompanying Advisory Committee Notes make clear that a showing of excusable neglect must be made to grant a motion for extension of time to file a notice of appeal that is brought after the 30-day period prescribed in Federal Rule of Appellate Procedure 4(a)(1) has expired, when there is no conflict among the courts of appeals regarding the interpretation of Federal Rule of Appellate Procedure 4(a)(5), and when Petitioners' reason for not timely filing an appeal or a motion to extend the time to file a notice of appeal was that counsel for Petitioner Estate of Eckert and counsel for the trustee for the Estate of Eckert had been unable to schedule a meeting with the trustee to discuss the appeal, which rationale does not amount to either good cause or excusable neglect?

2. Whether Petitioners have demonstrated that this case is of such imperative public importance as to justify a deviation for normal appellate practice to grant their Petition when they have made no showing that their conduct in failing to timely file a notice of appeal of the district court's summary judgment decision against them, or to timely file a motion to extend time to file a notice of appeal, constituted either excusable neglect or good cause?

3. Whether this Court has jurisdiction to consider the instant Petition when the district court was without

## QUESTIONS PRESENTED – Continued

authority to grant an extension of time to file a notice of appeal beyond November 12, 1993, but granted Petitioners an additional three days, until November 15, 1993, to file their appeal?

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Respondent William Simon respectfully submits this opposition to the petition for writ of certiorari:

## JUDGMENT AND OPINIONS BELOW

On August 16, 1993, the United States District Court for the Central District of California entered an order granting summary judgment in favor of Respondents Philip Wagner and William Simon, and against Petitioners, on Petitioners' First Amended Complaint for alleged: (1) breach of a trustee's statutory duty; (2) attorney malpractice; (3) breach of contract; and (4) fraud.[1] A judgment pursuant to Federal Rule of Civil Procedure 56 was entered on September 1, 1993. (App. A.)

On the thirty-third day after entry of the judgment, Petitioner Estate of Dale C. Eckert Corporation (Estate of Eckert) filed a motion to extend the time within which to file its notice of appeal. (App. B.) The motion was based solely on purported good cause and stated that counsel for the Estate of Eckert had attempted to make contact with counsel for the trustee of the estate, and that they (counsel for the Estate of Eckert and counsel for the trustee) had been unable to schedule a meeting wherein they could meet and discuss the appeal with the trustee of the Estate of Eckert. (App. B, p. 3.) This motion was

[1] Petitioner Estate of Dale C. Eckert Corporation was a debtor in bankruptcy under Title 11 of the United States Code. The district court had jurisdiction of this matter pursuant to Title 28, Section 1409, of the United States Code. The jurisdiction of the court of appeals is disputed by Mr. Simon.

opposed by Respondent Simon on the grounds that Petitioner Estate of Eckert had failed to demonstrate either excusable neglect or good cause to support the extension. (App. C.) On October 28, 1993, the district court granted the Estate of Eckert's motion and extended the time to file an appeal until November 15, 1993. (Petitioners' App.) The motion was granted without a hearing, and the district court did not state the basis for its decision. On November 15, 1993, Petitioners filed their appeal. (App. D.)

On December 13, 1993, Mr. Simon filed a motion in the court of appeals to dismiss the appeal for lack of jurisdiction arguing that the district court had improperly granted the motion to extend time to file the appeal because no showing of excusable neglect was made, and that the district court was without authority to grant an extension of time to file the appeal past November 12, 1995. (App. E.) *See* Fed. R. App. P. 4(a)(5). A motions panel of the court of appeals denied the motion, citing Federal Rule of Civil Procedure 6(a) dealing with the computation of time for filings or acts performed in the district court. (App. F.) Thereafter, Mr. Simon timely filed a motion to reconsider and/or clarify the ruling on his motion to dismiss. (App. G.) On March 4, 1994, Mr. Simon's motion for clarification was granted, but the court of appeals reserved "for the panel considering [the] appeal on its merits" the question "of whether the district court abused its discretion in extending the time to file a notice of appeal based exclusively on 'good cause.' " (App. H.)

On May 26, 1995, after considering the appeal without oral argument, the court of appeals determined that

the threshold issue of jurisdiction must first be resolved and remanded this case "to the district court for a finding of whether [Petitioners'] explanation [for failing to timely file a notice of appeal or a timely motion for extension of time to file an appeal] meets the *Pioneer Investment Services*[2] standard" of excusable neglect. (Petitioners' App., p. 5783.) On August 23, 1995, Petitioners submitted their Petition for Writ of Certiorari, challenging the court of appeals' remand order.

## JURISDICTION

It is respectfully submitted, as explained more fully below, that this Court does not have jurisdiction to review the order of the United States Court of Appeals for the Ninth Circuit by writ of certiorari because Petitioners have failed to demonstrate any special and important reason for the granting of their Petition and have also failed to demonstrate that this case is of such imperative public importance as to justify a deviation from normal appellate practice to grant their Petition. Additionally, the district court was without authority to grant Petitioners an extension of time to file their notice of appeal beyond November 12, 1993, and their appeal was therefore untimely and improper.

Furthermore, the decision of the United States Court of Appeals for the Ninth Circuit does not conflict with the decisions of other courts of appeals or state courts, nor

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[2] *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd., Partnership*, ___ U.S. ___, 113 S. Ct. 1489 (1993).

does it bring into question the validity of a treaty or statute of the United States or the validity of a statute of any state on the ground of its being repugnant to the Constitution, a treaty, or the laws of the United States, nor has Petitioner described any title, right, privilege, or immunity which would confer jurisdiction under the Constitution, a treaty, or the laws of the United States.

## STATEMENT OF THE CASE

The factual statement of the case contained in the opinion below of the United States Court of Appeals for the Ninth Circuit, included in Petitioners' Appendix, is hereby incorporated by reference for purposes of this opposition only.

## SUMMARY OF THE ARGUMENT

Petitioners have failed to demonstrate any special and important reason for the granting of their Petition. Specifically, the opinion of the United States Court of Appeals for the Ninth Circuit regarding the application and interpretation of Federal Rule of Appellate Procedure 4(a)(5)[3] is not in conflict with the decisions of other courts of appeals. Rule 4(a)(5) states that a "district court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time

[3] Unless specifically stated otherwise, all rules cited herein refer to the Federal Rules of Appellate Procedure.

prescribed by this Rule 4(a)." The Advisory Committee Notes following this Rule indicate that it was amended to add the "good cause" language because the excusable neglect standard "was an appropriate standard in cases in which the motion is made after the time for filing the notice of appeal has run . . . [but] it has never fit exactly the situation in which the appellant seeks an extension before the expiration of the initial time." Therefore, the good cause standard applies only to motions for extensions of time which are filed before the time to file a notice of appeal has expired.

Every court of appeals that has squarely addressed the issue has determined that a request for an extension of time to file a notice of appeal, filed before the notice of appeal is due, may be granted for good cause, but that a request for extension of time filed after the notice is due may only be granted under the excusable neglect standard. Though Petitioners cite several cases in an effort to rebut this position, a review of such cases readily demonstrates that they either have different factual circumstances than the case at hand and are thus distinguishable, or have been misconstrued by Petitioners.

Petitioners have also failed to demonstrate that this case is of such imperative public importance as to justify a deviation from normal appellate practice to grant their Petition. An analysis of the rationale for Petitioners' failure to timely file a notice of appeal (i.e., that Petitioners' counsel and counsel for the trustee of the Estate of Eckert had been unable to schedule a meeting wherein they could meet with "the trustee and obtain his instruction

regarding appeal") does not amount to excusable neglect or good cause.

It is well settled that indecision as to whether to appeal does not constitute excusable neglect for failure to timely file a notice of appeal. Nor does a request to extend the time to file a notice of appeal while a potential appellant ponders its options constitute either excusable neglect or good cause. Furthermore, good cause refers specifically to circumstances beyond a party's control, such as a mistake or a delay by court personnel. In this case, all the circumstances regarding Petitioners' appeal were in their control, or in the control of their counsel.

Finally, it is respectfully submitted that this Court does not have jurisdiction to review the order of the United States Court of Appeals for the Ninth Circuit by writ of certiorari because the district court lacked jurisdiction to extend the time for Petitioners to file a notice of appeal beyond November 12, 1993. Rule 4(a)(5) states that a district court may grant an extension of time to file a notice of appeal, upon motion filed within thirty days after the time to appeal has expired, but that such an extension shall not "exceed 30 days past such prescribed time or 10 days from the date of entry of the order granting the motion, whichever occurs later." In this case, despite the fact the time to appeal could not be extended beyond November 12, 1993, the district court granted Petitioners until November 15, 1993 to file their notice of appeal. The Federal Rules of Appellate Procedure are clear that the time for filing a notice of appeal may not be enlarged beyond what is specified in the Rules and, as a result, the district court was without authority to grant

this additional three days to Petitioners, and Petitioners' case is not properly before this Court.

## REASONS FOR DENYING THE WRIT

### I.

### PETITIONERS HAVE FAILED TO ESTABLISH ANY SPECIAL AND IMPORTANT REASON FOR THE GRANTING OF THEIR PETITION

Supreme Court Rule 10.1 states that review of a lower court's decision by writ of certiorari "is not a matter of right, *but of judicial discretion* . . . [and] will be granted *only when there are special and important reasons therefor.*" (Emphasis added.) Subpart (a) of Rule 10.1 states that one potential situation when review by writ of certiorari may be appropriate is when "a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter." *See generally Braxton v. United States*, ___ U.S. ___, 111 S. Ct. 1854 (1991).

Here, Petitioners have failed to demonstrate that any special and important reason exists for the granting of their Petition, specifically they have not demonstrated that there is a conflict among the courts of appeals regarding the interpretation and application of Rule 4(a)(5). As noted above, Petitioners failed to timely file a notice of appeal in this case. Instead, on October 4, 1993, three days after its time to appeal had expired, Petitioner Estate of Eckert filed a motion to extend the time within

which to file its notice of appeal.[4] This motion was based solely on the grounds that "good cause" supported an extension of time. However, the law is well settled that extension motions which are filed *after* the thirty-day period described in Rule 4(a)(1) has expired, must be supported by a showing of excusable neglect to be granted.

Rule 4(a)(5) states that "[t]he district court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by this Rule 4(a)." The "good cause" language of Rule 4(a)(5) applies only to extension motions that are filed within the thirty-day period. If a party does not move for an extension of time within the thirty-day period set forth in Rule 4(a)(1), *the good cause standard is inapplicable and the party must meet the higher burden of excusable neglect. Oregon v. Champion Int'l Corp.*, 680 F.2d 1300, 1301 (9th Cir. 1982); *see also Pearson v. Gatto*, 933 F.2d 521, 524 (7th Cir. 1991); *Vogelsang v. Patterson Dental Co.*, 904 F.2d 427, 431 (8th Cir. 1990); *Allied Steel v. City of Abilene*, 909 F.2d 139, 143 n.3 (5th Cir. 1990); *Borio v. Coastal Marine Constr. Co.*, 881 F.2d 1053, 1055 (11th Cir. 1989); *Consolidated Freightways Corp. v. Larson*, 827 F.2d 916 (3d Cir. 1987), *cert. denied*, 484 U.S. 1032 (1988); *In re Cosmopolitan Aviation Corp.*, 763 F.2d 507 (2d Cir.), *cert. denied sub nom., Rothman v. New York State Dep't of Transp.*,

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[4] Since only Petitioner Estate of Eckert was a movant, it is respectfully submitted that Petitioner Reynolds has not appealed the summary judgment order of the district court, and has no standing to challenge the court of appeals' ruling below.

474 U.S. 1032 (1985). As stated by this Court in *Champion Int'l Corp.*:

> "good cause" . . . is applicable only where a motion is filed before the [expiration] of the thirty-day period. The good cause language was added to the Rule [4(a)(5)] by a 1979 amendment because the excusable neglect standard "never fit exactly the situation in which the appellant seeks an extension before the expiration of the initial time." Advisory Committee Notes to 1979 amendment to Fed. R. App. P. 4(a)(5);[5] *see* 9

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[5] The Advisory Committee Notes to Rule 4(a)(5) state, in relevant part, as follows:

> The proposed amended rule expands to some extent the standard for the grant of an extension of time. The present rule requires [only] a "showing of excusable neglect." While this was an appropriate standard in cases in which the motion is made after the time for filing the notice of appeal has run, and remains so, it has never fit exactly the situation in which the appellant seeks an extension before the expiration of the initial time. In such a case "good cause," which is the standard that is applied in the granting of other extensions of time under Rule 26(b) seems to be more appropriate.

Though Petitioners argue that the language of Rule 4(a)(5) should be interpreted "as it is written" without any consideration of the stated purpose for that rule or its amendment, such an approach is, in the words of the late Chief Judge Marvin Jones of the United States Court of Claims, "singularly free from any suspicion of logic." *Belcher v. United States*, 94 Ct. Cl. 137, 140 (1941). It is well established that the "ultimate objective" of interpreting any statute or rule is to give effect to the intent of the promulgators of that statute or rule. *See, e.g., Spencer v. Brown*, 17 F.3d 368, 372 (Fed. Cir. 1994). Even assuming *arguendo* that Rule 4(a)(5) was unclear, it would be a matter of course that the Advisory Committee Notes would be consulted and relied upon. *See, e.g., Blum v. Stenson*, 465 U.S. 886, 896-97 (1984).

> *Moore's Federal Practice* ¶ 204.13[1.-1] (2d ed. 1980).

*Champion Int'l Corp.*, 680 F.2d at 1301. This interpretation is consistent with that made by the *Pearson* court:

> The advisory notes to Rule 4(a)(5) make clear that a request for an extension of time filed *before* the notice of appeal is due may be granted for good cause, but a request for extension filed *after* the notice is due may only be granted under the higher excusable neglect standard.

*Pearson*, 933 F.2d at 524; *see also Allied Steel*, 909 F.2d at 143 n.3 (good cause standard not considered because appellant did not request an extension before expiration of the thirty-day appeal time set by Rule 4(a)(1)). It is respectfully submitted that in light of the Advisory Committee Notes to Rule 4(a)(5), and the overwhelming authority following that interpretation, there is no conflict which would require a ruling from this Court to resolve.

Though Petitioners argue that there are numerous courts of appeals which disagree with the Ninth Circuit's interpretation and application of Rule 4(a)(5) (i.e., that "excusable neglect" must be demonstrated when a motion to extend time to file a notice of appeal is filed after the initial thirty-day period has expired), their position is belied by a review of the cases cited in their Petition. Such a review readily demonstrates that the cases cited either have different factual circumstances than the case at hand and are thus distinguishable, or have been misconstrued by Petitioners.

For example, the court in *Pryor v. Marshall*, 711 F.2d 63, 65 (6th Cir. 1983) dealt with whether a late notice of

appeal could serve as a substitute for a motion for extension of time under Rule 4(a)(5), not whether an untimely extension motion could be granted on a showing of only good cause. Similarly, in *Weekly v. Jones*, 927 F.2d 382 (8th Cir. 1991), a motion for extension of time to file an appeal was filed on the 30th day after notice of entry of judgment was given. The *Weekly* court found that the motion was *timely* and that either the good cause or excusable neglect standard was applicable. *Weekly*, 927 F.2d at 385-86. Moreover, the decision in *Cyrak v. Lemon*, 919 F.2d 320 (5th Cir. 1990) dealt with the issue of which appeal among multiple appeals started the time to run for filing a cross-appeal under Federal Rule of Appellate Procedure 4(a)(3) when the first appeal was later dismissed for want of prosecution. The court in *Buggs v. Elgin, Joliet & Eastern Ry.*, 852 F.2d 318 (7th Cir. 1988) cited Rule 4(a)(5), with emphasis on the thirty-day provision, to determine whether a party who appealed an amended judgment, entered over seven months after the original judgment had been filed, had timely filed an appeal. *Buggs*, 852 F.2d at 322-23.

Though the United States Court of Appeals for the First Circuit has made reference to the "appropriate" interpretation of Federal Rule of Appellate Procedure 4(a)(5) in dicta, it has not squarely addressed the issue. *See Pontarelli v. Stone*, 930 F.2d 104 (1st Cir. 1991) (holding that the failure to individually and separately identify all appellants in the notice of appeal constituted inexcusable neglect); *Scarpa v. Murphy*, 782 F.2d 300 (1st Cir. 1986) (motion to extend time to file a notice of appeal based on excusable neglect was granted when notice of appeal was timely mailed, but failed to include the street number on

address of courthouse, and post office failed to deliver until after time to file notice of appeal had expired). Further, the opinion of the United States Court of Appeals for the Eleventh Circuit in *Wright v. Deyton*, 757 F.2d 1253 (11th Cir. 1985), appears to have been overruled by its later decision in *Borio v. Coastal Marine Constr. Co.*, 881 F.2d 1053, 1055 (11th Cir. 1989).[6] It is therefore respectfully submitted that no conflict exists which would warrant a writ of certiorari to review the underlying remand.

## II.

## PETITIONERS HAVE FAILED TO DEMONSTRATE THAT THIS CASE IS OF SUCH IMPERATIVE PUBLIC IMPORTANCE AS TO JUSTIFY THE GRANTING OF THEIR PETITION

Supreme Court Rule 11 states as follows:

> A petition for writ of certiorari to review a case pending in a United States court of appeals, before judgment is given in that court, will be granted *only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate settlement in this Court.*

(Emphasis added.)

It is respectfully submitted that, in light of the reasons set forth in Section I, *supra*, Petitioners have failed to demonstrate that this case of such imperative public

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[6] In addition to being substantively overruled, it appears that the *Wright v. Deyton* opinion has never been cited for the same proposition for which Petitioners have cited it.

importance as to justify a deviation from normal appellate practice and have this Court grant their Petition. As noted above, the decision of the United States Court of Appeals for the Ninth Circuit recognized that the threshold issue of jurisdiction must first be resolved before the substantive appeal can be adjudicated, and remanded this case to the district court for a finding of whether Petitioners' explanation for failing to timely file a notice of appeal, or a timely motion for extension of time to file an appeal, constitutes excusable neglect as defined by the Court's recent decision in *Pioneer Investment*. The court of appeals' ruling was in response to the arguments raised by Respondents that Petitioners had failed to demonstrate either good cause or excusable neglect to support an extension of time to file their appeal.

In making this determination, the court of appeals stated that it had traditionally "viewed excusable neglect through a narrow lens, finding the standard satisfied only in 'extraordinary cases where injustice would otherwise result'." *Reynolds v. Wagner*, No. 93-56629, slip op. at 5780 (9th Cir. May 26, 1995) (quoting *Oregon v. Champion Int'l Corp.*, 680 F.2d 1300, 1301 (9th Cir. 1982)); *see also Alaska Limestone Corp. v. Hodel*, 799 F.2d 1409, 1411 (9th Cir. 1986) (inadvertence or mistake of counsel does not constitute excusable neglect). The court of appeals, recognizing that its traditional view of excusable neglect was at odds with the liberalized meaning of excusable neglect under *Pioneer Investment*, held that "attorney negligence may, in certain circumstances, constitute 'excusable neglect'." *Reynolds v. Wagner*, No. 93-56629, slip op. at 5781 (9th Cir. May 26, 1995) (construing *Pioneer Inv. Servs. Co.*, ___ U.S. at ___, 113 S. Ct. at 1494-99 (1993)). It is important to note,

though, that Petitioners have failed to demonstrate that the Estate of Eckert's motion for extension of time to file a notice of appeal was supported by either excusable neglect or good cause.

First, there has been no showing that Petitioners' conduct constitutes excusable neglect, even under the *Pioneer Investment* standard. Petitioners have not demonstrated that their failure to timely file a notice of appeal, or a timely motion to extend time to file a notice of appeal, was due to attorney negligence or other potential excusable neglect. Rather, Petitioner Estate of Eckert moved for an extension of time (after the thirty-day period prescribed in Rule 4(a)(1) had expired) based solely upon alleged good cause. The rationale provided by the Estate of Eckert was that counsel for Petitioners had not received "timely instruction from all parties from whom instruction must be received" in order to have authorization to file the appeal.

Further, the declaration in support of the untimely motion states that counsel for the Estate of Eckert transmitted a copy of the summary judgment minute order to counsel for the Estate of Eckert on August 26, 1993 (thirty-five days before the initial thirty-day period expired), and requested instructions regarding appeal. The declaration also states that Petitioners' counsel and counsel for the trustee of the Estate of Eckert had "tried to make contact on several occasions," but had "been unable to schedule a meeting wherein [they] could meet with the trustee and obtain his instruction regarding appeal." Such facts do not constitute excusable neglect. *See Pioneer Inv. Servs. Co.*, ___ U.S. at ___, 113 S. Ct. at 1494-99 (1993).

It is well settled that indecision regarding whether to appeal a judgment does not constitute excusable neglect for failure to timely file a notice of appeal. *Cleek Aviation v. United States*, 22 Cl. Ct. 260, 261 (1991). In *Cleek*, the potential appellant had filed its notice of appeal the day after the deadline expired, in violation of Rule 4(a)(1). *Id.* at 261. Although the potential appellant's counsel argued that he was delayed in filing a notice of appeal because he was awaiting additional instruction from his client regarding whether to appeal, and that he should therefore have been allowed an extension of time, the court held that indecision as to whether to appeal did not constitute a basis for failure to timely file a notice of appeal. *Id.* at 262. *See also Gann v. Smith*, 442 F.2d 352, 353 (5th Cir. 1971) (the fact that State Attorney General changed his mind about appealing decision was not excusable neglect); *Nichols-Morris Corp. v. Morris*, 279 F.2d 81, 83 (2d Cir. 1960) (client's inability to make a decision on appeal was not excusable neglect); *United States v. Virginia*, 508 F. Supp. 187, 189-90 (E.D. Va. 1981) (indecisiveness of Solicitor General of United States did not constitute excusable neglect).

Moreover, the court in *Allied Steel*, in interpreting the scope of Rule 4(a)(5), stated that the Rule "clearly indicates that potential appellants *may not regard the period during which a district court may extend the time for filing a notice of appeal as a further period in which to ponder their options.*" *Allied Steel*, 909 F.2d at 143 (emphasis added). Accordingly, Petitioners have failed to demonstrate that their conduct in failing to timely appeal, or to timely request additional time to appeal, constituted excusable neglect.

Nor have Petitioners been able to make a showing of good cause, the very argument upon which their motion to extend was predicated. Good cause refers to circumstances beyond a party's control, such as a mistake or delay by court personnel. *See Aldabe v. Aldabe*, 616 F.2d 1089 (9th Cir. 1980) (court's delay in filing a notice after timely receiving it constituted good cause); *Meek v. Metropolitan Dade County*, 908 F.2d 1540 (11th Cir. 1990) (justifiable reliance on clerk's erroneous information regarding time to appeal constituted good cause). Conversely, *circumstances within a party's control do not constitute good cause. See Pontarelli v. Stone*, 930 F.2d 104 (1st Cir. 1991) (counsel's mistake in referring to parties with the term *"et al."* did not constitute good cause). Here, all the circumstances described regarding Petitioners' inability to timely file a notice of appeal, or to timely file a motion to extend time to file a notice of appeal, were within the control of Petitioners and their counsel, and no showing of good cause has been made.

It is respectfully submitted that Petitioners have not demonstrated that this case is of such imperative public importance as to justify this Court's deviating from normal appellate practice and granting the instant Petition, and that the Petition should be denied.

## III.

## THE DISTRICT COURT LACKED JURISDICTION TO EXTEND THE TIME FOR PETITIONERS TO FILE THEIR NOTICE OF APPEAL BEYOND NOVEMBER 12, 1993

A further reason to deny the Petition *sub judice* exists in the fact that the extension of time granted by the

district court exceeded the time allowed by the Federal Rules of Appellate Procedure. Rule 4(a)(5) allows an extension of time, after the proper showing (which has not been made in this case), "not later than 30 days after the expiration of the time prescribed by . . . Rule 4(a)[(1)] . . . or 10 days from the date of entry of the order granting the motion, *whichever occurs later*." (Emphasis added.) Accordingly, because the order granting the motion to extend the time for Petitioners to appeal was entered on October 28, 1993, *the latest that such time could possibly be extended under the Rules was November 12, 1993.*[7]

Despite this fact, Petitioners were granted an extension of time until November 15, 1993. (*See* Petitioners' App.) The law is well settled that a district court lacks authority to extend the time to appeal beyond that allowed by Rule 4(a)(5). *Certain Underwriters at Lloyds of London v. Evans*, 896 F.2d 1255, 1256 (10th Cir. 1990). The law is equally well settled that if the district court abused

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[7] The original appeal time expired on October 1, 1993, and the thirtieth day thereafter was October 31, 1993. (Since October 31, 1993 was a Sunday, it is assumed that the time would have extended to November 1, 1993.) However, the district court's order granting Petitioners an extension of time was entered on October 28, 1993; and Petitioners therefore would have been entitled to ten days from that date to file their notice of appeal. Taking into account Federal Rule of Civil Procedure 6(a), which excludes from any computation of time all intermediate Saturdays, Sundays, and legal holidays when the "time prescribed or allowed is less than 11 days," the latest possible date to extend the time for Petitioners to appeal in this case was November 12, 1993. (November 11, 1993 was Veteran's Day, a legal holiday, and Federal Rule of Civil Procedure 6(e) would not add any additional time for mailing. *See* Fed. R. Civ. P. 77(d); *Lashley v. Ford Motor Co.*, 518 F.2d 749, 750 (5th Cir. 1975).)

its discretion by extending the time for Petitioners to appeal beyond that contemplated by the Federal Rules of Appellate Procedure, subsequent courts of review are also without jurisdiction. *See Rodgers v. Watt*, 722 F.2d 456, 458 (9th Cir. 1983); *Larez v. City of Los Angeles*, 946 F.2d 630 (9th Cir. 1991); *McCalden v. California Library Ass'n*, 919 F.2d 538 (9th Cir. 1990); *Allah v. Superior Court*, 871 F.2d 887, 890 n.1 (9th Cir. 1989).

Additionally, it is respectfully asserted that the rules regarding the time provisions for filing of a notice of appeal cannot be suspended by a subsequent reviewing court. Suspension of the rules is governed by Rule 2, which states that the Rules may be suspended "[i]n the interest of expediting decision, or for other good cause shown . . . *except as otherwise provided in Rule 26(b).*" (Emphasis added.) Rule 26(b) states that a court of appeals may enlarge time under the rules, but that it "*may not enlarge the time for filing a notice of appeal.*" (Emphasis added.) Thus, Petitioners' appeal was untimely and their current Petition should be dismissed for lack of jurisdiction.

## CONCLUSION

For all the reasons set forth herein, Respondent William Simon respectfully requests that the Petition for Writ of Certiorari in this matter be denied.

Respectfully submitted,

CHARLES C. WEHNER*
STEPHEN T. HODGE

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**Counsel of Record for Respondent William Simon*

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Attorneys for Defendant Philip B. Wagner

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

| | |
|---|---|
| GRANT REYNOLDS and THE ESTATE OF DALE C. ECKERT CORPORATION,<br><br>Plaintiffs,<br><br>vs.<br><br>PHILIP B. WAGNER and WILLIAM SIMON,<br><br>Defendants. | CASE NO. SAVC-91-395 GLT (RWRX)<br><br>JUDGMENT PURSUANT TO FEDERAL RULE 56<br><br>(Filed Aug. 30, 1993) |

This action came on for hearing before the Court, on July 26, 1993, the Honorable Gary L. Taylor, on the Motion of Defendant Philip B. Wagner for Summary Judgment and the Motion of William Simon for Summary Judgment, and the evidence presented having been fully considered, the issues having been duly heard and a decision having been duly rendered as follows:

> "Evidence is present which could ordinarily raise a triable issue as to whether the lender was more than a lender, and the loan at issue was in actuality a joint venture. However this evidence

is foreclosed by the D'Oench Duhme doctrine, 12 U.S.C. 1823(e). *See Langley v. FDIC*, 484 U.S. 83 (1987), *see also FDIC v. Hamilton*, 939 F.2d 1225 (5th Cir. 1991). The Court may not draw inferences from the documents presented, and concludes that there is no evidence to raise a triable issue that ail of the necessary legal steps could reasonably have been completed successfully before 12 U.S.C. 1823(e) became applicable in this case."

IT IS ORDERED AND ADJUDGED that the Plaintiff take nothing, that the entire action be dismissed on the merits and that defendants Philip B. Wagner and William Simon recover their costs.

DATED: 8/30/, 1993

/s/ Gary S. Taylor
GARY S. TAYLOR
UNITED STATES
DISTRICT JUDGE

# APPENDIX B

THE LAW OFFICE OF WILLIAM McKINNON
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Attorney for Plaintiffs Grant Reynolds
and Estate of Dale C. Eckert Corporation

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

| | |
|---|---|
| GRANT REYNOLDS and THE ESTATE OF DALE C. ECKERT CORPORATION<br><br>Plaintiffs,<br><br>vs.<br><br>PHILIP B. WAGNER and WILLIAM SIMON<br><br>Defendants | No. SAVC91-395 GLT (RWRX)<br><br>NOTICE OF MOTION AND MOTION FOR EXTENSION OF TIME FOR FILING NOTICE OF APPEAL<br><br>[FRAP 4(a)(5)] |

**TO: ALL PARTIES AND THEIR ATTORNEYS OF RECORD**

Please take notice that on November 1, 1993, at 10 a.m. or as soon thereafter as counsel can be heard, in Courtroom 2, United States Court House, 751 West Santa Ana Blvd., #101, Santa Ana, CA 92701-4599, the undersigned will bring the following Motion for an Extention of Time to file a Notice of Appeal on for hearing.

October 4, 1993

THE LAW OFFICE OF
WILLIAM McKINNON

/s/ William McKinnon
William McKinnon

THE LAW OFFICE OF WILLIAM McKINNON
William McKinnon – CA State Bar No. 129329
540 North Santa Cruz Avenue, #230
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Tel: (408) 395-2725
FAX: (408) 395-2026
Attorney for Plaintiffs Grant Reynolds
and Estate of Dale C. Eckert Corporation

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

| | |
|---|---|
| GRANT REYNOLDS and THE ESTATE OF DALE C. ECKERT CORPORATION<br><br>Plaintiffs,<br><br>vs.<br><br>PHILIP B. WAGNER and WILLIAM SIMON<br><br>Defendants | No. SAVC91-395 GLT (RWRX)<br><br>MOTION FOR EXTENSION OF TIME FOR FILING NOTICE OF APPEAL; DECLARATION IN SUPPORT.<br><br>[FRAP 4(a)(5)] |

Pursuant to Rule 4(a)(5) of the Federal Rules of Appellate Procedure, the Estate of Dale C. Eckert, the palintiff [*sic*] above named, moves the court for an order extending to November 1, 1993 the time [*sic*] filing of an notice of appeal by said plaintiff to the United States Court of Appeal for the Second Circuit from the judgment entered in this action on September 1, 1993.

This motion is made on the grounds of good cause based on the failure of counsel for the Estate of Dale C. Eckert Corporation to obtain timely instruction from all parties from whom instruction must be received in order

that counsel be properly authorized to act for said plaintiff. Moving party submits the Declaration of William McKinnon, special counsel to the Estate of Dale C. Eckert Corp. in support.

October 4, 1993

THE LAW OFFICE OF
WILLIAM McKINNON

/s/ William McKinnon
William McKinnon

DECLARATION OF WILLIAM McKINNON

I, **WILLIAM McKINNON**, declare as follows:

1. I am the attorney of record for plaintiff Estate of Dale C. Eckert, and as such have personal knowledge of the matters herein stated.

2. On August 26, 1993 I transmitted to counsel for the trustee of said Estate a copy of the Minute Order of this court together with a request for instructions on appeal.

3. Although both he and I have to make contract on several occasions, to this date we have been unable to schedule a meeting where in he and I could meet with the trustee and obtain his instruction regarding appeal.

4. In part pursuit [*sic*] of the rights on behalf of said Estate is the responsibility of Mr. Grant Reynolds, the other plaintiff herein. There exists the theoretical possibility that I could receive contradictory instruction from Mr. Reynolds and the trustee, and could therefore be compelled to seek instruction from the Bankruptcy Court prior to filing or abandoning the appeal.

I declare under the penalty of perjury under the laws of the State of California that the foregoing is true and correct of my own personal knowledge and if called upon as a witness could competently testify thereto.

Executed on the 4 th. day of October, 1993 at Los Gatos, California.

/s/ William McKinnon
William McKinnon

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Attorneys for Defendant William Simon

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

| | |
|---|---|
| GRANT REYNOLDS and THE ESTATE OF DALE C. ECKERT CORPORATION,<br><br>Plaintiffs,<br><br>vs.<br><br>PHILIP B. WAGNER and WILLIAM SIMON,<br><br>Defendants. | NO. SACV91-395 GLT (RWRX)<br><br>MEMORANDUM OF POINTS AND AUTHORITIES OF WILLIAM SIMON IN OPPOSITION TO MOTION OF PLAINTIFF ESTATE OF ECKERT FOR EXTENSION OF TIME TO FILE NOTICE OF APPEAL<br><br>DATE: November 1, 1993<br>TIME: 10:00 a.m.<br>PLACE: Courtroom of Honorable Gary L. Taylor:<br><br>(Filed Oct. 14, 1993) |

Defendant William Simon submits the instant memorandum of points and authorities in opposition to the Motion of plaintiff Estate of Eckert, served on October 4, 1993, for an extension of time to file a notice of appeal

from judgment entered in favor of defendant Simon (and defendant Wagner).

That "Judgment Pursuant to Federal Rule 56" in favor of the defendants was signed and filed on August 30, 1993, and was entered on September 1, 1993. Pursuant to Rule 4(a)(1), F.R.App.P, the notice of appeal was required to be filed within thirty (30) days of September 1, 1993, that is, on or before Friday, October 1, 1993. That 30-day period for filing of a notice of appeal is mandatory and jurisdictional. *Browder v. Director, Dept. of Corrections of Illinois*, 434 U.S. 257, 98 S. Ct. 556 (1978); *Price v. Seydel*, 961 F. 2d 1470, 1473 (9th Cir. 1992).

Notwithstanding the lapse of the 30-day jurisdictional period for the Estate of Eckert to file a notice of appeal, the Estate of Eckert asks this court to now extend the time for filing based upon the alleged "good cause" that it needs additional time to consider whether to pursue an appeal. That purported "good cause" basis to seek to extend the time to file a notice of appeal is not cognizable by the appellate rules and should be summarily rejected as a matter of law.

Pursuant to Rule 4(a)(5) of the Federal Rules of Appellate Procedure, the Court, upon a showing of excusable neglect or good cause, may, on proper motion timely made, extend the time for filing of a notice of appeal for a period of thirty days following the prescribed time or for 10-days following entry of the Order granting the notice, whatever occurs later. Under Rule 4(a)(5), the request for such an extension within which to file a notice of appeal based upon "good cause" *must be filed before* the expiration of the jurisdictional 30-day

appeal period. *See: Pearson v. Gato*, 933 F. 2d 521, 524 (7th Cir. 1991). As stated in *Pearson*:

> "The advisory notes to Rule 4(a)(5) make clear that a request for an extension of time filed *before* [emphasis is original] the notice of appeal is due may be granted for good cause, but a request for extension filed *after* [emphasis is original] the notice is due may only be granted under the higher excusable neglect standard. [Citations omitted.]"

*Accord*: *Allied Steel, General Contractor v. City of Abilene*, 909 F. 2d 139, 143 and ftnt. 3 (5th Cir. 1990); *Park-Chapley Constr. Co. v. Cherrington*, 865 F. 2d 907, 909-11 (7th Cir. 1989); *State of Oregon v. Champion Intern. Corp.*, 680 F. 2d 1300, 1301 (9th Cir. 1982).

Here, the Estate of Eckert motion for an extension of time within which to decide whether to file a notice of appeal is based solely on an alleged "good cause" submission. Even assuming "good cause" (in fact, not existent herein), the Estate of Eckert motion was *not* filed within the mandatory jurisdictional 30-day period for the filing of the notice of appeal. Therefore, this court should not, and indeed may not, extend the time for filing a notice of appeal on that basis. A "good cause" motion *must* be filed within the mandatory 30-day notice of appeal period, to be timely and to be considered by the Court. Here, the Estate of Eckert motion was not timely filed and *no* showing of cause can justify an extension. Nor can a mere request for more time to conisder [*sic*] filing a

notice of appeal constitute just cause. As stated in *Allied Steel* (*supra.*):

> "Almost any party to any dispute could argue truthfully that unique or extraordinary circumstances had distracted its attention. [citations omitted]. District Courts have no principled means of distinguishing among circumstances. Requiring courts constantly to adjudicate claims of extraordinary or unique circumstances would defeat the purpose of the time limitation in Rule 4(a)(1) – to provide a definite point at which, in the absence of a notice of appeal, litigation will cease. [citation omitted]. Rule 4(a)(5) clearly indicates that *potential appellants may not regard the period during which a district court may extend the time for filing a notice of appeal as a further period in which to ponder their options.* [emphasis added]."

The "good cause" motion of the Estate of Eckert is based solely upon a request to permit a further period for Eckert to "ponder its options". That basis for an extension of time, sought *after* the expiration of the 30-day appeal period, simply is not recognized by the appellate rules, and the motion of the Estate of Eckert should be rejected herein.

Eckert's motion to obtain an extension of time to file a notice of appeal based on good cause is untimely and not cognizable under Rule 4(a)(5).[1] Consequently, that motion should be denied.

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[1] Nor has the Estate of Eckert attempted to make, or made, any showing to satisfy the higher standard of "excusable neglect." It is clear that inadvertence or mistake of counsel does not constitute excusable neglect. *See: State of Oregon v. Champion*

Dated: October 14, 1993

Respectfully submitted,

WEHNER AND PERLMAN
CHARLES C. WEHNER
STEVEN M. COHEN

By: Charles C. Wehner
Charles C. Wehner
Attorneys for Defendant
William Simon

---

*Intern. Corp.*, 680 F. 2d 1300, 1301 (9th Cir. 1982); *Sprout v. Farmers Insurance Exchange*, 681 F. 2d 587 (9th Cir. 1982). Moreover, even inadvertent non-compliance with the rules of appellate procedure, does not, without more, constitute excusable neglect for purposes of Rule 4(a)(5). *Rivera v. Puerto Rico Telephone Co.*, 921 F. 2d 393, 395-396 (1st Cir. 1990) (Failure to name multiple appealing parties in notice of appeal by using name "Elias Rivera, et al.", *not* excusable neglect. No appeal rights as to non-named parties.).

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Attorney for Plaintiffs Grant Reynolds
and Estate of Dale C. Eckert Corporation

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

| | |
|---|---|
| GRANT REYNOLDS and THE ESTATE OF DALE C. ECKERT CORPORATION<br><br>Plaintiffs,<br><br>vs.<br><br>PHILIP B. WAGNER and WILLIAM SIMON<br><br>Defendants | No. SAVC91-395 GLT (RWRX)<br><br>NOTICE OF APPEAL<br><br>[FRAP 3, 4(a)]<br><br>(Filed Nov. 15, 1993) |

**NOTICE IS HEREBY GIVEN** that Plaintiff Estate of Dale C. Eckert Corporation, above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the judgment entered in this action on September 1, 1993. This Notice is timely filed pursuant to the Minute Order of the trial Court dated October 29, 1993,

granting an extention of time to file this notice until November 15, 1993.

November 12, 1993 THE LAW OFFICE OF WILLIAM McKINNON

/s/ William McKinnon
William McKinnon

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Attorneys for Appellee William Simon

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

| | |
|---|---|
| GRANT REYNOLDS and THE ESTATE OF DALE C. ECKERT CORPORATION,<br><br>Appellants,<br><br>vs.<br><br>PHILIP B. WAGNER and WILLIAM SIMON,<br><br>Appellees. | NO.93-56629<br>DIST CT. NO.<br>SAVCB91-395 GLT<br><br>NOTICE OF MOTION AND MOTION TO DISMISS APPEAL FOR LACK OF JURISDICTION; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT; DECLARATION OF CHARLES C. WEHNER<br><br>[SEPARATE EXHIBIT VOLUME FILED CONCURRENTLY HEREWITH] |

TO ALL PARTIES AND TO THEIR RESPECTIVE ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that, as soon as the matter may be heard in the above-entitled Court, located at 121 Spear Street, San Francisco, California, Appellee William

Simon will, and hereby does, move the Court for an order dismissing the appeal of Appellant Estate of Dale C. Eckert Corporation (Estate of Eckert) for lack of subject matter jurisdiction.

This motion is brought pursuant to Federal Rule of Appellate Procedure 27, and will be based upon this notice, the attached memorandum of points and authorities, the attached declaration, the exhibits included herewith, all pleadings and papers on file herein, and upon such oral or documentary evidence which may be presented at the hearing of this Motion.

DATED: December 10, 1993

Respectfully submitted,

WEHNER AND PERLMAN
Charles C. Wehner, Esq.
Stephen T. Hodge, Esq.

By: /s/ Charles C. Wehner
CHARLES C. WEHNER
Attorneys for Appellee
William Simon

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## MEMORANDUM OF POINTS AND AUTHORITIES

### I. INTRODUCTION

This matter arises from the filing of an untimely and improper notice of appeal by Appellant Estate of Dale C. Eckert Corporation (Estate of Eckert), after the District Court entered judgment against the Estate of Eckert and Grant Reynolds, and in favor of defendants in the action below, Philip B. Wagner and William Simon, on September 1, 1993. (*See* District Court's September 1, 1993 Judgment, included herewith as Exhibit A.) Pursuant to Rule 4(a)(1) of the Federal Rules of Appellate Procedure,[1] the Estate of Eckert was then required to file its notice of appeal, if an appeal were contemplated, within "30 days after the date of entry of the judgment or order appealed

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[1] Unless specifically stated otherwise, all rules cited herein refer to the Federal Rules of Appellate Procedure.

from." In other words, the Estate of Eckert had until October 1, 1993, to file its appeal. It failed to do so.

Instead, on October 4, 1993, the Estate of Eckert filed a motion to extend the time within which to file a notice of appeal. (Estate of Eckert's Motion For Extension of Time for Filing Notice of Appeal, included herewith as Exhibit B.) The motion was based on appellant's indecision whether to pursue an appeal, and argued that such indecision constituted "good cause" to extend the time to appeal beyond the 30-day limit. (Exhibit B, at 2-3.) Both Mr. Simon and Mr. Wagner opposed the motion on the grounds that (1) the Estate of Eckert had made no showing of good cause, (2) the good cause standard was inapplicable since the 30-day period had expired, and (3) no excusable neglect was present in this case, nor could the record support such a finding. (*See* Simon Opp. and Wagner Opp., included herewith respectively as Exhibits C and D.) After taking the matter under submission without hearing, the District Court, on October 28, 1993, granted the Estate of Eckert's motion and ordered that a notice of appeal be filed no later than November 15, 1993. (October 28, 1993 Minute Order, included herewith as Exhibit F.) Accordingly, the Estate of Eckert filed its appeal on November 15, 1993.[2] (Exhibit G.)

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[2] Mr. Reynolds, a plaintiff in the underlying case, did not appeal the District Court's decision. In actuality, neither did the Estate of Eckert since its notice of appeal was not served on counsel for appellee Simon (despite the proof of service to the contrary). Rather, Mr. Simon finally received notice of the appeal on November 29, 1993, apparently from the Clerk of the Court. (*See* Wehner Decl.) Failure to timely serve a notice of appeal may require that it be stricken. Fed. R. Civ. P. 5; *see*

It is respectfully submitted that the instant appeal should be dismissed for lack of subject matter jurisdiction. Appellant failed to comply with Rule 4(a)(1) by waiting until after the expiration of the 30-day period to ask for an extension, and thereafter failed to establish a sufficient showing under Rule 4(a)(5) to warrant the granting of an extension. As a result, the appeal of the Estate of Eckert was untimely and improper, and should be dismissed.

## II. STANDARD OF REVIEW

The standard for reviewing a district court's order granting an extension of time to file an appeal is abuse of discretion. *See, e.g., Oregon v. Champion Int'l Corp.*, 680 F.2d 1300 (9th Cir. 1982). A court abuses its discretion when it bases its decision on an erroneous conclusion of law or when the record contains no evidence on which it could rationally have based its decision. *B.P. North America Trading v. Vessel Panamax Nova*, 784 F.2d 975, 976-77 (9th Cir. 1986).

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*Kramer, Levin, Nessen, Kamin & Frankel v. Aronoff*, 638 F. Supp. 714 (S.D.N.Y. 1986) (a motion to strike a plea may be granted if plea has been filed irregularly, is not sworn to, if that is required, or warrants signature of counsel, or any defect of that character).

## III. AS A MATTER OF LAW, NO GOOD CAUSE EXISTED FOR THE EXTENSION OF THE ESTATE OF ECKERT'S TIME TO FILE A NOTICE OF APPEAL

As stated above, the Estate of Eckert failed to file a notice of appeal within 30 days after a judgment was entered against it on September 1, 1993. Fed. R. App. P. 4(a)(1); *see* Exhibit F. This time limit is mandatory and jurisdictional. *Browder v. Department of Corrections*, 434 U.S. 257 (1978); *Price v. Seydel*, 961 F.2d 1470, 1473 (9th Cir. 1992); *Parke-Chapley Constr. Co. v. Cherrington*, 865 F.2d 907, 908-09 (7th Cir. 1989). However, a party may, within 30 days after the expiration of the time to appeal, move to extend the time to file an appeal under Rule 4(a)(5) upon a showing of good cause or excusable neglect. *See* Fed. R. App. P. 4(a)(5).

If a party does not move for an extension of time within the 30-day period set forth in Rule 4(a)(1), *the good cause standard is inapplicable and the party must meet the higher burden of excusable neglect. Oregon v. Champion Int'l Corp.*, 680 F.2d 1300, 1301 (9th Cir. 1982); *see also Pearson v. Gatto*, 933 F.2d 521, 524 (7th Cir. 1991); *Allied Steel v. City of Abilene*, 909 F.2d 139, 143 n.3 (5th Cir. 1990); *Consolidated Freightways Corp. v. Larson*, 827 F.2d 916 (3d Cir. 1987), *cert. denied*, 484 U.S. 1032 (1988); *In re Cosmopolitan Aviation Corp.*, 763 F.2d 507 (2d Cir.), *cert. denied sub nom., Rothman v. New York State Dep't of Transp.*, 474 U.S. 1032 (1985). As stated by this Court in *Champion Int'l Corp.*:

> "good cause" . . . is applicable only where a motion is filed before the [expiration] of the thirty-day period. The good cause language was added to the Rule [4(a)(5)] by a 1979 amendment because the excusable neglect standard "never

> fit exactly the situation in which the appellant seeks an extension before the expiration of the initial time." Advisory Committee Notes to 1979 amendment to Fed. R. App. P. 4(a)(5); *see 9 Moore's Federal Practice* ¶ 204.13[I.-1] (2d ed. 1980).

*Champion Int'l Corp.*, 680 F.2d at 1301. This interpretation is consistent with that made by the *Pearson* court:

> The advisory notes to Rule 4(a)(5) make clear that a request for an extension of time filed *before* the notice of appeal is due may be granted for good cause, but a request for extension filed *after* the notice is due may only be granted under the higher excusable neglect standard.

*Pearson*, 933 F.2d at 524; *see also Allied Steel*, 909 F.2d at 143 n.3 (good cause standard not considered because appellant did not request an extension before expiration of the 30-day appeal time set by Rule 4(a)(1)).

Here, the Estate of Eckert waited until October 4, 1993, 33 days after entry of judgment, to move to extend the time in which to appeal the District Court's decision. (Exhibit B.) Although the good cause standard no longer applied and Appellant was required to make a showing of excusable neglect in support of its motion, Appellant's motion *was based solely on purported good cause*. (*See* Exhibit B, at 2-3.) Thus, Appellant's motion to extend the appeal time in this case should not have been granted.

Additionally, the rationale offered by the Estate of Eckert, i.e., that it needed additional time to determine

whether to pursue an appeal, was not good cause.[3] Good cause refers to circumstances beyond a party's control, such as a mistake or delay by court personnel. *See Aldabe v. Aldabe*, 616 F.2d 1089 (9th Cir. 1980) (court's delay in filing a notice after timely receiving it, constituted good cause); *Meek v. Metropolitan Dade County*, 908 F.2d 1540 (11th Cir. 1990) (justifiable reliance on clerk's erroneous information regarding time to appeal constituted good cause). Conversely, *circumstances within a party's control do not constitute good cause. See Pontarelli v. Stone*, 930 F.2d 104 (1st Cir. 1991) (counsel's mistake in referring to parties with the term *"et al."* did not constitute good cause); *Wright v. Deyton*, 757 F.2d 1253, 1255 n.5 (11th Cir. 1985) ("a litigant cannot sit idly by and allow his filing deadline to approach and then argue that compliance with the deadline should be excused since his letter was posted in sufficient time to meet the deadline if the mail had followed its ordinary course"). Accordingly, Appellant's motion to extend the appeal time in this case should not have been granted.

## IV. THE ESTATE OF ECKERT DID NOT MAKE, NOR COULD IT HAVE MADE, A SHOWING OF EXCUSABLE NEGLECT TO SUPPORT ITS MOTION TO EXTEND THE APPEAL TIME

Since Appellant's motion to extend the appeal time in this case was not filed within the original 30-day period, it was incumbent upon Appellant to make a showing of

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[3] Appellant contended that it had been "unable to schedule a meeting" wherein it could obtain the trustee's instruction regarding appeal. (Exhibit B, at 3:20-22.)

excusable neglect to have adequate grounds for the granting of its motion. *See, e.g., Champion Int'l Corp.*, 680 F.2d at 1301 (and cases cited above). It failed to do so and relied wholly on the alleged good cause of needing additional time in which to decide whether to pursue an appeal. (*See* Exhibit B.) Thus, the motion of the Estate of Eckert was unsupported by the requisite showing of excusable neglect, and there was an insufficient basis upon which to extend the appeal time in this case.

Although Appellant did not argue that excusable neglect was present in this case (*see* Exhibits B and E), assuming *arguendo* that the grounds stated could be interpreted as an argument for excusable neglect, that argument fails as a matter of law. This Court has made clear that the standard for determining excusable neglect "is a 'strict' one." *Champion Int'l Corp.*, 680 F.2d at 1301 (citing *Selph v. Council of Los Angeles*, 593 F.2d 881, 883 (9th Cir. 1979) (quoting Advisory Committee Notes to 1966 amendment to Fed. R. Civ. P. 73, the predecessor of Fed. R. App. P. 4(a))). "Inadvertence or mistake of counsel does not constitute excusable neglect. Nor does clerical error by counsel's staff." *Champion Int'l Corp.*, 680 F.2d at 1301 (citations omitted). Ample authority limits excusable neglect to the occurrence of unusual circumstances that cause injustice to a party, or to uncontrollable and unpredictable events beyond a party's control. *See Pearson*, 933 F.2d at 524.

Moreover, the court in *Allied Steel*, in interpreting the scope of Rule 4(a)(5), stated that "Rule 4(a)(5) clearly indicates that potential appellants *may not regard the period during which a district court may extend the time for filing a notice of appeal as a further period in which to ponder*

*their options." Allied Steel*, 909 F.2d at 143 (emphasis added).[4] This decision is in accord with the decisions of other courts.

For example, in *Cleek Aviation v. United States*, 22 Cl. Ct. 260, 261 (1991), it was held that indecision as to whether to appeal did not constitute excusable neglect for failure to timely file a notice of appeal. The potential appellant in *Cleek* had filed its notice of appeal the day after the deadline expired, in violation of Rule 4(a)(1). *Id.* at 261. Although the potential appellant's counsel argued that he was delayed in filing a notice of appeal because he was awaiting additional instruction from his client regarding whether to appeal, and that he should therefore have been allowed an extension of time, the court held that indecision as to whether to appeal did not constitute a basis for failure to timely file a notice of appeal. *Id.* at 262. *See also Gann v. Smith*, 442 F.2d 352, 353 (5th Cir. 1971) (the fact that State Attorney General changed his mind about appealing decision was not excusable neglect); *Nichols-Morris Corp. v. Morris*, 279 F.2d 81, 83, (2d Cir. 1960) (client's inability to make a decision on appeal was not excusable neglect); *United States v. Virginia*, 508 F. Supp. 187, 189-90 (E.D. Va. 1981) (indecisiveness of Solicitor General of United States did not constitute excusable neglect).

Here, the Estate of Eckert offered no justification to extend the time to file an appeal in this case other than its

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[4] The *Allied Steel* interpretation of Rule 4(a)(5) indicates that a potential appellant's request to extend the time to file a notice of appeal while it ponders its options, does not constitute either excusable neglect *or* good cause.

desire to have additional time in which to decide whether to pursue an appeal. In fact, Appellant stated that it might decide not to pursue an appeal, but it just wanted time to consider the option. (Exhibit E, at 3:19-22.) Because such a rationale does not, as a matter of law, constitute excusable neglect, there was no basis upon which the District Court could have reasonably based its decision to grant an extension to Appellant.

## V. THE EXTENSION OF TIME GRANTED EXCEEDED THE TIME ALLOWED BY THE FEDERAL RULES OF APPELLATE PROCEDURE

A further reason exists to grant Mr. Simon's motion to dismiss the instant appeal in that the extension of time granted by the District Court exceeded the time allowed by the Federal Rules of Appellate Procedure. Rule 4(a)(5) allows an extension of time, after the proper showing (which has not been made in this case), "not later than 30 days after the expiration of the time prescribed by . . . Rule 4(a)[(1)]. . . . or 10 days from the date of entry of the order granting the motion, *whichever occurs later.*" (Emphasis added.) Accordingly, since the order granting the motion to extend the appeal time was entered on October 28, 1993, *the latest possible time to extend the appeal was November 8, 1993.*[5]

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[5] The original appeal time expired on October 1, 1993, and 30 days after was October 31, 1993. (Since October 31, 1993 was a Sunday, it assumed that the time would have extended to November 1, 1993.) However, the District Court's order granting appellant an extension was entered on October 28, 1993; 10 days after that date was November 7, 1993, a Sunday. Thus, the

Despite this fact, the Estate of Eckert was granted an extension of time until November 15, 1993. (Exhibit F.) The law is well settled that the District Court lacked authority to extend the Estate of Eckert's appeal time beyond that allowed by Rule 4(a)(5). *Certain Underwriters at Lloyds of London v. Evans*, 896 F.2d 1255, 1256 (10th Cir. 1990). The law is equally well settled that if the District Court abused its discretion by extending the time for appeal beyond that contemplated by the Rules, this Court is without jurisdiction. *Rodgers v. Watt*, 722 F.2d 456, 458 (9th Cir. 1983); *see Larez v. City of Los Angeles*, 946 F.2d 630 (9th Cir. 1991); *McCalden v. California Library Ass'n*, 919 F.2d 538 (9th Cir. 1990); *Allah v. Superior Court*, 871 F.2d 887, 890 n.1 (9th Cir. 1989).

Additionally, it is respectfully asserted that this Court could not, even if it were disposed to do so, suspend the Rules regarding the time provisions for filing of a notice of appeal. Suspension of the Rules is governed by Rule 2, which states that the rules may be suspended "[i]n the interest of expediting decision, or for other good cause shown,. . . . *except as otherwise provided in Rule 26(b).*" (Emphasis added.) Rule 26(b) states that the Court may enlarge time under the Rules, but that it *"may not enlarge the time for filing a notice of appeal."* (Emphasis added.) Thus, appeal of the Estate of Eckert, being untimely, should be dismissed for lack of jurisdiction.

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latest possible date to extend the appeal time in this case was November 8, 1993.

## VI. CONCLUSION

For the all the foregoing reasons, Appellee Simon respectfully requests that the Court grant his motion to dismiss the appeal of the Estate of Eckert, as well as any other and further relief that the Court deems appropriate.

DATED: December ___, 1993

Respectfully submitted,

WEHNER AND PERLMAN
Charles C. Wehner, Esq.
Stephen T. Hodge, Esq.

By: /s/ Charles C. Wehner
CHARLES C. WEHNER
Attorneys for Appellee
William Simon

---

## DECLARATION OF CHARLES C. WEHNER

I, CHARLES C. WEHNER, hereby declare as follows:

1. I am an attorney at law properly admitted to practice before all the courts of the State of California, and before the United States Court of Appeals for the Ninth Circuit, and am a partner in the law firm of Wehner and Perlman, attorneys for Appellee, William Simon. The following facts are within my personal knowledge and, if sworn as a witness, I could and would competently testify thereto.

2. On November 29, 1993, I received a notice of appeal in this case from the Clerk of the Court the Notice of Appeal.

3. I had not previously received the notice of appeal from Appellant's counsel.

4. A true and correct copy of the District Court's judgment in this case, which was entered on September 1, 1993, is included herewith as Exhibit A.

5. A true and correct copy of the Notice of Motion and Motion of the Estate of Eckert for Extension of Time for Filing Notice of Appeal, filed with the District Court on October 4, 1993, is included herewith as Exhibit B.

6. A true and correct copy of Appellee William Simon's Memorandum of Points and Authorities in Opposition to the Motion of the Estate of Eckert for Extension of Time for Filing Notice of Appeal, is included herewith as Exhibit C.

7. A true and correct copy of Appellee Philip Wagner's Memorandum of Points and Authorities in Opposition to the Motion of the Estate of Eckert for Extension of Time for Filing Notice of Appeal, is included herewith as Exhibit D.

8. A true and correct copy of the Estate of Eckert's Reply Memorandum in Support of Motion for Additional Time to File Notice of Appeal is included herewith as Exhibit E.

9. A true and correct copy of the District Court's October 28, 1993 Minute Order, granting the Estate of Eckert until November 15, 1993 to file its notice of appeal, is included herewith as Exhibit F.

10. A true and correct copy of the Notice of Appeal filed by the Estate of Eckert on November 15, 1993, is included herewith as Exhibit G.

I hereby declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 10 the day of December, 1993, at Los Angeles, California.

/s/ Charles C. Wehner
Charles C. Wehner

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

| | |
|---|---|
| GRANT REYNOLDS, and the ESTATE OF DALE C. ECKERT CORPORATION,<br><br>Plaintiffs-Appellants,<br><br>vs.<br><br>PHILLIP B. WAGNER, et al.,<br><br>Defendants-Appellees. | No. 93-56629<br><br>DC# CV-91-00395-GLT Central California (Santa Ana)<br><br>ORDER<br><br>(Filed Dec. 22, 1993) |

Before: NOONAN and TROTT, Circuit Judges

Appellees' motions to dismiss the appeal are denied. *See* Fed. R. Civ. P. 6(a).

The briefing schedule established by the Clerk shall remain in effect.

# APPENDIX G

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

| | |
|---|---|
| GRANT REYNOLDS and THE ESTATE OF DALE C. ECKERT CORPORATION,<br><br>Appellants.<br><br>vs.<br><br>PHILIP B. WAGNER and WILLIAM SIMON,<br><br>Appellees. | NO. 93-56629<br><br>DIST CT. NO. SAVCB91-395 GLT<br><br>MOTION FOR RECONSIDERATION OF APPELLEE SIMON'S MOTION TO DISMISS APPEAL FOR LACK OF JURISDICTION; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT |

TO ALL PARTIES AND TO THEIR RESPECTIVE ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that, as soon as the matter may be heard in the above-entitled Court, located at 121 Spear Street, San Francisco, California, Appellee William Simon will, and hereby does, petition the Court to reconsider his motion for an order dismissing the appeal of

Appellant Estate of Dale C. Eckert Corporation (Estate of Eckert) for lack of subject matter jurisdiction.

This petition is brought pursuant to Federal Rule of Appellate Procedure 40 and Circuit Rule 27-10, and will be based upon this notice, the attached memorandum of points and authorities, the attached exhibits, all pleadings and papers on file herein, and upon such other evidence that may be considered during the determination of this petition.

DATED: January 5, 1994

Respectfully submitted,

WEHNER AND PERLMAN
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Stephen T. Hodge, Esq.

By: Charles C. Wehner
CHARLES C. WEHNER
Attorneys for Appellee
William Simon

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## MEMORANDUM OF POINTS AND AUTHORITES

## I. INTRODUCTION

On December 22, 1993, an order was filed by this Court denying Appellee William Simon's motion to dismiss this appeal,[1] based solely upon Federal Rule of Civil Procedure 6(a). It is respectfully submitted that the Court overlooked or misapprehended the threshold issue of the failure of the Estate of Dale C. Eckert Corporation (Estate of Eckert) to appeal the judgment against it within the 30-day period prescribed by Federal Rule of Appellate Procedure 4(a)(1). It is well settled that the timely filing of a notice of appeal is jurisdictional, and that this Court lacks the power to adjudicate cases in which an appeal was not timely filed. Consequently, the failure of the Estate of Eckert to file its notice of appeal until after the 30-day period had expired prevents the Court from entertaining the instant appeal.

Mr. Simon's motion to dismiss this appeal was directed primarily toward this Court's lack of jurisdiction, but also addressed the District Court's lack of jurisdiction to extend the time for filing an appeal without a showing of excusable neglect, as required by Federal Rule of Appellate Procedure 4(a)(5). Once the Estate of Eckert let the 30-day period set forth by Rule 4(a)(1) of the Federal Rules of Appellate Procedure expire without filing a notice of appeal or a motion to extend the time for appeal, an extension in the appeal time could only be

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[1] Mr. Simon filed his motion to dismiss this appeal, accompanied by supporting exhibits, (copies of which are attached hereto respectively as Exhibits A and B) on or about December 10, 1993.

granted upon a showing of excusable neglect. The Estate of Eckert neither made such a showing, nor did it seek to establish excusable neglect. Although the Estate of Eckert argued that it needed additional time in which to consider an appeal, its reason for an extension was patently insufficient under both the good cause or excusable neglect standards.

In determining Mr. Simon's motion to dismiss the appeal, the Court relied solely upon Federal Rule of Civil Procedure 6(a) (attached hereto as Exhibit C), which sets forth the computation of time for filing documents when the last day to file falls upon a weekend or holiday when the time prescribed to file a document is less than 11 days. It is respectfully submitted that Federal Rule of Civil Procedure 6(a) is inapplicable to the jurisdictional issue since the last day of the initial 30-day period for filing a notice of appeal fell on October 1, 1993, a Friday, which was not a legal holiday; and because the District Court lacked authority to extend the time for filing a notice of appeal after that 30 day period when no "excuseable neglect" was demonstrated or even advanced. Consequently, Federal Rule of Civil Procedure 6(a) did not impact the expiration of the Estate of Eckert's time within which the notice of appeal was required to be filed and jurisdiction does not exist for this appeal.

Additionally, Federal Rule of Civil Procedure 6(a) and Federal Rule of Appellate Procedure 4(a)(5) would only have allowed an extension of time until November 12, 1993 (ten days from the entry of the extension order on October 28, 1993, excluding intermediate weekends and holidays), not until November 15, 1993, as granted by the District Court. Consequently, the District Court Order

(sought after expiration of the juridictional 30 day period for filing the notice of appeal was was an abuse of discretion.

## II. APPELLANT FAILED TO FILE A NOTICE OF APPEAL, OR MOTION TO EXTEND THE TIME FOR APPEAL, BEFORE THE RUNNING OF THE 30-DAY PERIOD AND ITS APPEAL IS UNTIMELY

As set forth more fully in Mr. Simon's motion to dismiss, the Estate of Eckert failed to timely appeal after a judgment was entered against it on September 1, 1993. According to Rule 4(a)(1) of the Federal Rules of Appellate Procedure,[2] the Estate of Eckert was required to file its notice of appeal, if an appeal were contemplated, within "30 days after the date of entry of the judgment or order appealed from." In other words, the Estate of Eckert had until October 1, 1993, to file its appeal. It failed do so, and did not move for an extension of time to appeal until October 4, 1993. As a result, the Estate of Eckert's appeal is untimely and this Court lacks jurisdiction to hear the appeal. *Browder v. Department of Corrections*, 434 U.S. 257 (1978); *Price v. Seydel*, 961 F.2d 1470, 1473 (9th Cir. 1992); *Parke-Chapley Constr. Co. v. Cherrington*, 865 F.2d 907, 908-09 (7th Cir. 1989).

Although the Court cited Federal Rule of Civil Procedure 6(a), in its denial of Mr. Simon's motion to dismiss, that rule is inapplicable since the last day to file an

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[2] Unless specifically stated otherwise, all rules cited herein refer to the Federal Rules of Appellate Procedure.

appeal fell on a Friday that was not a national holiday.[3] Nor could any provision of Federal Rule of Civil Procedure 6 have impacted the expiration of the Estate of Eckert's appeal time since subsection (b) of that rule specifically does not apply to Rule 4(a), subsections (c) and (d) are irrelevant, and subsection (e) could not have extended the time for appeal. *See* Fed. R. Civ. P. 77(d); *Lashley v. Ford Motor Co.*, 518 F.2d 749, 750 (5th Cir. 1975).

## III. THE DISTRICT COURT HAD NO JURISDICTION, AFTER THE EXPIRATION OF THE 30-DAY PERIOD, TO EXTEND THE TIME FOR AN APPEAL ABSENT A SHOWING OF EXCUSABLE NEGLECT

As stated previously, if a party does not move for an extension of time within the 30-day period set forth in

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[3] Federal Rule of Civil Procedure 6(a) is, in relevant part, as follows:

> In computing any period of time prescribed or allowed by these rules, by the local rules of any district court, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, or, when the act to be done is the filing of a paper in court, a day on which weather or other conditions have made the office of the clerk of the district court inaccessible, in which event the period runs until the end of the next day which is not one of the aforementioned days. When the period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation.

Rule 4(a)(1), *the good cause standard is inapplicable and the party must meet the higher burden of excusable neglect. Oregon v. Champion Int'l Corp.*, 680 F.2d 1300, 1301 (9th Cir. 1982); *see also Pearson v. Gatto*, 933 F.2d 521, 524 (7th Cir. 1991); *Allied Steel v. City of Abilene*, 909 F.2d 139, 143 n.3 (5th Cir. 1990); *Consolidated Freightways Corp. v. Larson*, 827 F.2d 916 (3d Cir. 1987), *cert. denied*, 484 U.S. 1032 (1988); *In re "Cosmopolitan Aviation Corp.*, 763 F.2d 507 (2d Cir.), *cert. denied sub nom., Rothman v. New York State Dep't of Transp.*, 474 U.S. 1032 (1985). Here, the Estate of Eckert's motion for an extension *was based solely upon its desire to have additional time within which to consider an appeal* – a patently insufficient reason to establish even "good cause", much less the required "excusable neglect". Consequently, the District Court's granting of an extension without such a showing was an abuse of discretion.

Furthermore, even if the good cause standard had been applicable (which it was not), the Estate of Eckert failed even to demonstrate good cause. Good cause refers to circumstances beyond a party's control, such as a mistake or delay by court personnel, not a failure to obtain a meeting with a client to discuss the possibility of an appeal. *See Aldabe v. Aldabe*, 616 F.2d 1089 (9th Cir. 1980) (court's delay in filing a notice after timely receiving it, constituted good cause); *Meek v. Metropolitan Dade County*, 908 F.2d 1540 (11th Cir. 1990) (justifiable reliance on clerk's erroneous information regarding time to appeal constituted good cause). Conversely, *circumstances within a party's control do not constitute good cause. See Pontarelli v. Stone*, 930 F.2d 104 (1st Cir. 1991) (counsel's mistake in

referring to parties with the term *"et al."* did not constitute good cause); *Wright v. Deyton*, 757 F.2d 1253, 1255 n.5 (11th Cir. 1985) ("a litigant cannot sit idly by and allow his filing deadline to approach and then argue that compliance with the deadline should be excused since his letter was posted in sufficient time to meet the deadline if the mail had followed its ordinary course"). Accordingly, the District Court abused its discretion in granting Appellant's motion to extend the appeal time in this case.

## IV. THE DISTRICT COURT WAS WITHOUT AUTHORITY TO GRANT AN EXTENSION UNTIL NOVEMBER 15, 1993

Although the Estate of Eckert should not have been allowed to file a notice of appeal after its time to do so expired, it also should not have been given until November 15, 1993, to file its appeal. Pursuant to Rule 4(a)(5), an extension of time may be given "not later than 30 days after the expiration of the time prescribed by . . . Rule 4(a)[(1)]. . . . or 10 days from the date of entry of the order granting the motion, *whichever occurs later.*" (Emphasis added.) Since the order granting the motion to extend the appeal time was entered on October 28, 1993, *the latest possible time to extend the appeal was November 12, 1993.*

In his motion to dismiss, Mr. Simon argued that last day to extend the appeal time was November 8, 1993. However, taking into consideration Federal Rule of Civil Procedure 6(a), time should have been added for all intermediate weekends and Veteran's Day. With all intermediate Saturdays, Sundays, and legal holidays accounted for, the last day of the extension should have

been no later than November 12, 1993.[4] Thus, the following chain of events, when analyzed objectively, demonstrate a substantial basis for the rehearing of Mr. Simon's motion to dismiss:

| | |
|---|---|
| September 1, 1993 | Judgment against the Estate of Eckert is entered. |
| October 1, 1993 | Time for appeal expires – *no action is taken by the Estate of Eckert.* |
| October 4, 1993 | The Estate of Eckert files its motion for an extension of time, based solely upon good cause. |
| October 28, 1993 | An extension of time until November 15, 1993 is entered. |
| November 1, 1993 | 31 days from expiration of appeal time (the 30th day fell on a Sunday). |
| November 11, 1993 | Veteran's Day |
| November 12, 1993 | Last day to which an appeal could have been extended (excluding two weekends and Veteran's Day). |
| November 15, 1993 | Notice of appeal filed by the Estate of Eckert. |

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[4] Federal Rule of Civil Procedure 6(e) does not add additional time after entry of a judgment or order. *See* Fed. R. Civ. P. 77(d); *Lashley v. Ford Motor Co.*, 518 F.2d 749, 750 (5th Cir. 1975).

## V. CONCLUSION

For the all the foregoing reasons, Appellee Simon respectfully requests that the Court reconsider this motion to dismiss the appeal of the Estate of Eckert, as well as any other and further relief that the Court deems appropriate.

DATED: January 5, 1994

Respectfully submitted,

WEHNER AND PERLMAN
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By: /s/ Charles C. Wehner
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William Simon

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

| | | |
|---|---|---|
| GRANT REYNOLDS, et al., Plaintiffs-Appellants, vs. PHILLIP B. WAGNER, et al., Defendants-Appellees. | ) | No. 93-56629<br>DC# CV-91-00395-GLT<br>Central California (Santa Ana)<br>ORDER<br>(Filed March 4, 1994) |

Before: NOONAN and TROTT, Circuit Judges

Appellees' motion for reconsideration of the court's order of December 22, 1993 is denied. *See United Artists Corp. v. La Cage Aux Folles*, 771 F. 2d 1265 (9th Cir. 1985).

Appellees' motion for clarification is granted to the following extent. The question of whether the district court abused its discretion in extending the time to file a notice of appeal based exclusively on "good cause" is referred to the panel considering this appeal on its merits.

No further motions for reconsideration, rehearing or clarification of the December 22, 1993 order or of this order shall be filed or entertained.

Supreme Court, U.S.
FILED
SEP 28 1995
CLERK

No. 95-320

In The

# Supreme Court of the United States

October Term, 1995

GRANT REYNOLDS and THE ESTATE OF DALE C. ECKERT CORPORATION, IN BANKRUPTCY,

*Petitioners,*

v.

PHILIP WAGNER and WILLIAM SIMON,

*Respondents.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## OPPOSITION OF RESPONDENT PHILIP WAGNER TO PETITION FOR WRIT OF CERTIORARI

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## I. BASIS FOR JURISDICTION

Petitioner contends jurisdiction in this Court is conferred by United States Supreme Court Rule 10.1(a), based on a conflict among the United States Circuit Courts of Appeals on the subject matter of the decision of the Ninth Circuit Court of Appeals in this matter. Respondent respectfully submits there is no conflict among the Courts of Appeals regarding the subject matter of the decision of the United States Court of Appeals for the Ninth Circuit in this matter.

## II. OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

### A. Introduction

Respondent Philip Wagner ("Respondent") hereby opposes the Petition for Writ of Certiorari submitted by Petitioners Grant Reynolds ("Reynolds") and the Estate of Dale C. Eckert Corporation ("Eckert") (collectively "Petitioners") with respect to the May 26, 1995 decision by the United States Court of Appeals for the Ninth Circuit. The Ninth Circuit remanded this matter to the United States District Court for the Central District of California, Hon. Gary S. Taylor, for a determination as to whether Petitioners demonstrated "excusable neglect" pursuant to Federal Rule of Appellate Procedure ("F.R.A.P.") 4(a)(5), satisfying the standard required in order to obtain leave to file a late appeal to the Circuit Court of Appeals, on a motion filed *after* expiration of the initial jurisdictional thirty-day period of time within which to file an appeal under F.R.A.P. Rule 4(a)(1).

Following the District Court's entry of summary judgment in favor of Respondent against Petitioners, Petitioners failed to appeal within thirty days. Eckert thereafter moved for leave to file a late appeal, the Court granted Eckert's motion, and the Ninth Circuit denied Respondents' motions to dismiss the appeal for lack of jurisdiction, but granted reconsideration to the extent the jurisdictional issue was referred to the panel hearing the appeal. Thereafter, the Ninth Circuit considered the jurisdictional issue first, and remanded the case back to the District Court in order to determine whether Petitioners met the standard of "excusable neglect" set forth in this Court's decision in *Pioneer Inv. Servs. Co. v. Brunswick Assoc. Ltd. Partnership*, ___ U.S. ___, 113 S.Ct. 1489, 123 L.Ed.2d 74 (1993). Petitioners' motion for reconsideration and suggestion for rehearing *en banc* were denied. Prior to the District Court's hearing on remand, Petitioners filed their Petition for Writ of Certiorari to this Court, arguing the Ninth Circuit's order to consider only the "excusable neglect" standard conflicted with F.R.A.P. Rule 4(a)(5) and the decisional law of six other Circuit Courts.

Careful reading of the cases cited by Petitioners, however, reveals there is *no* such conflict among the circuits, and the law remains clear that motions for leave to file a late appeal submitted *after* expiration of the initial thirty-day period within which to appeal require a showing of "excusable neglect", a standard Petitioners failed to satisfy in the Court below. The Petition should be denied.

### B. The Excuse Offered By Petitioner Eckert Did Not Satisfy *Any* Standard For Leave to File A Late Appeal

The District Court granted summary judgment in favor of Respondents herein on September 1, 1993. The time period under F.R.A.P. Rule 4(a) for filing a timely notice of appeal expired on October 1, 1993. No notice of appeal or motion for enlargement of time was filed within that time period. Instead, three days *after* the initial thirty-day period of time within which to appeal expired, Petitioner Eckert moved for leave to file a late appeal. Petitioner Eckert's motion was based solely on its purported showing of "good cause", on the grounds counsel had been unable to schedule a meeting with the Eckert Bankruptcy Trustee and his counsel to "obtain his instruction regarding appeal", and thus was unsure whether to proceed with the appeal. "Counsel gave no reason for his inability to meet with the trustee; instead, he stated simply that '[a]lthough both [counsel for the trustee] and I have tried to make contact on several occasions, to this date we have been unable to schedule a meeting wherein he and I could meet with the trustee and obtain his instruction regarding appeal.' " (Decision of the Ninth Circuit Court of Appeals, page 5780.) The motion, made on October 4, 1993, acknowledged the Decision granting Summary Judgment had been transmitted to the Trustee on *August* 26, 1993. The time to appeal from the September 1, 1993 Judgment expired on *October* 1, 1993. Without explanation, the District Court granted Eckert additional time to file its appeal.

Eckert's motion made no mention of *any* excuse for the delayed appeal by Petitioner *Reynolds* (nor did the

subsequent Notice of Appeal purport to constitute an appeal on behalf of Reynolds, although the Ninth Circuit found that because Reynolds was referred to in the caption of the case, he had satisfied F.R.A.P. Rule 3(c)). Reynolds has never offered *any* explanation for tardiness in the filing of his appeal.

Respondents opposed the motion for extension of time to file an appeal, arguing Petitioner Eckert had failed to demonstrate "excusable neglect" for the late appeal. The District Court granted the motion in a minute order which did not specify whether it was based on "good cause" or "excusable neglect", and the Court extended the time for Petitioners to appeal to November 15, 1993, by order dated October 28, 1993. A Notice of Appeal indicating that "Plaintiff Estate of Dale C. Eckert Corporation, above named, hereby appeals" was filed on November 15, 1993.

There is *no* authority which supports granting a motion for leave to file a late appeal filed after the initial thirty-day period simply because the Appellant, with knowledge of the decision to be appealed, has been unable to schedule a meeting with counsel within the first thirty days to discuss the appeal, and is still unsure *after* the thirty days whether to appeal at all. Respondents contended in the District Court and in the Ninth Circuit that the purported justification offered in this case for failing to file a notice of appeal within thirty days after entry of judgment satisfied neither the "excusable neglect" standard, *nor* the "good cause" standard.

### C. The Thirty-Day Time Period Within Which To File An Appeal Is Uniformly Applied As A Rigid, Strictly Construed *Jurisdictional* Requirement; Petitioners' Argument Would Eviscerate F.R.A.P. 4(a)(1), Essentially Converting It Into A Sixty-Day Rule

F.R.A.P. 4(a)(1) provides that a "notice of appeal *shall* be filed within 30 days after the date of entry of the judgment . . . appealed from." (emphasis added).

> "The requirement of a timely notice of appeal is 'mandatory and jurisdictional.' "

*Browder v. Department of Corrections*, 434 U.S. 257, 264, 98 S.Ct. 556, 561, 54 L.Ed. 521 (1978).

> "The purpose of the timeliness requirements of Rule 4(a)(1) . . . , 'is to provide a definite point at which, in the absence of a notice of appeal, litigation will come to a close.' Thus, 'the requirements of [Rule] 4(a)(1) and its predecessors with respect to the time for taking an appeal have long been treated as especially *rigid*.' "

*650 Park Ave. Corp. v. McRae*, 836 F.2d 764, 766 (2d Cir. 1988) (citations omitted) (emphasis added).

F.R.A.P. 4(a)(5) provides for an *exception* to this rule, which the District Court may, in its discretion, decide to apply, under the appropriate circumstances, as follows:

> "[t]he district court, upon a showing of excusable neglect or good cause, *may* extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by this Rule 4(a)."

F.R.A.P. 4(a)(5) (emphasis added).

Rule 4(a)(5) was amended in 1979 to include the "or good cause" language. The Advisory Committee Notes on Rule 4(a)(5) provide, in relevant part, as follows:

> "The proposed amended rule expands to some extent the standard for the grant of an extension of time. The present rule requires a 'showing of excusable neglect.' While this was an appropriate standard in cases in which the motion is made *after* the time for filing the notice of appeal has run, and remains so, it has never fit exactly the situation in which the appellant seeks an extension before the expiration of the initial time. In such a case 'good cause,' which is the standard that it is applied in the granting of other extensions of time under Rule 26(b) seems to be more appropriate."

F.R.A.P. 4(a)(5) (Advisory Committee Notes).

The overwhelming majority of Circuit Courts of Appeal have adopted this standard in holding that if a party fails to bring a motion for extension of time to file a notice of appeal within thirty days following entry of judgment, the "good cause" standard will not apply, and the higher "excusable neglect" standard will apply. *Oregon v. Champion Int'l Corp.*, 680 F.2d 1300, 1301 (9th Cir. 1982); *Redfield v. Continental Casualty Co.*, 818 F.2d 596, 601 (7th Cir. 1987); *In Re Cosmopolitan Aviation Corp.*, 763 F.2d 507, 514 (2d Cir), *cert. denied*, 474 U.S. 1032, 106 S.Ct. 593, 88 L.Ed.2d 573 (1985); *Parke-Chapley Const. Co. v. Cherrington*, 865 F.2d 907, 909-910 (7th Cir. 1989); *Allied Steel v. City of Abilene*, 909 F.2d 139, 143, n.3 (5th Cir. 1990); *Consolidated Freightways Corp. v. Larson*, 827 F.2d 916, 918 (3d Cir. 1987), *cert. denied*, 484 U.S. 1032 (1988). *Vogelsang v. Patterson Dental Co.*, 904 F.2d 427, 431 (8th Cir. 1990); *Borio v. Coastal Marine Constr. Co.*, 881 F.2d 1053, 1055

(11th Cir. 1989); *U.S. v. Twomey*, 845 F.2d 1132, 1134 (1st Cir. 1988).

> "A strict construction of Rule 4(a)(1) necessarily and logically compels us to erect a high threshold in our determination of 'excusable neglect' under Rule 4(a)(5). . . . Loosely interpreting 'excusable neglect' would convert the thirty-day period for appeal provided in F.R.A.P. 4(a) into a 60-day one – a result clearly not intended by the Rule's framers. [Citations to *Parke*]."

*Allied Steel v. City of Abilene*, 909 F.2d at 143 (5th Cir. 1990).

> "Rule 4(a)(5) clearly indicates that potential appellants may not regard the period during which a district court may extend the time for filing a notice of appeal as a further period in which to ponder their options."

*Id.* at 143.

Appellants appear to cite *Lorenzen v. Exp. Ret. Plan of Sperry & Hutchinson*, 896 F.2d 228 (7th Cir. 1990) for the proposition that there is little difference between the "good cause" and the "excusable neglect" standards. (Petition for Certiorari, page 18). This interpretation, however, is incorrect. The Seventh Circuit expressly held that the 'good cause' standard is limited to requests for extensions filed within the original time period for filing the appeal. Otherwise, the correct standard is "excusable neglect", which is in accord with the Advisory Committee's description of the framer's intent in drafting the amendment to F.R.A.P. 4(a)(5). *Id.* at 231. The language

Appellants did *not* cite is more helpful to this analysis than what Appellants *did* quote from *Lorenzen*:

> "[I]t is too soon to reexamine Cherrington [*Parke-Chapley Const. Co. v. Cherrington*, 865 F.2d 907 (7th Cir. 1989) which stands for the proposition that 'good cause' standard applies only during the first thirty days following entry of judgment], especially when its position is that of a majority of the circuits to have ruled on the question. And in defense of that position we point out that when the time for taking an appeal has passed without a peep from the losing party, the winner's interest in finality and repose is greater than if within that time a document is filed indicating that the loser wants to appeal. . . . But it should not require thirty days to decide whether one has a non-frivolous ground for appeal. The exotic excuses for failing to file a timely appeal – mistake of law (as here) and the like – come into play only when the notice has not been filed within the 30 days. All the interesting cases, therefore, will arise under the excusable neglect standard. Perhaps all the cases, period. There are no reported decisions of the meaning of 'good cause' in Rule 4(a)(5)."

*Id.* at 232.

Here, according to Eckert's motion, Petitioners had not even *conferred* about the appeal as of thirty-three days *after* entry of judgment, beyond the F.R.A.P 4(a)(1) thirty-day jurisdictional period. As Repondents argued in the Ninth Circuit, under any accepted interpretation of the Rule, Petitioners did not qualify for more time to file their appeal.

### D. F.R.A.P. Rule 4(a)(5) Permits the District Court to Exercise Its Discretion In Determining Whether To Allow a Late Appeal, And The Language of the Rule Does Not *Require* The Court to Utilize Both Good Cause *and* Excusable Neglect In Considering Such An Application

Rule 4(a)(5) provides that the Court *may* consider such an application for extension of time to file a notice of appeal, and provides that, when it does, it *may* use a standard of excusable neglect or good cause. That is precisely what the District Courts have uniformly done. Using the full extent of the discretion provided by the Rule, the District Courts have applied the "good cause" standard when application is filed within the *first* thirty days, and the "excusable neglect" standard when the application is filed *after* expiration of the time period.

Petitioners argue that this violates the clear import of the Rule. However, the clear import of the Rule is found in the Committee's notes, which, while they support Respondents' views on the correct standard to apply after the time to appeal has expired, Petitioners ask this Court to ignore because the language of the Rule is purportedly not ambiguous. To be sure, the Circuit Courts, interpreting the Rule, have applied standards which meet the needs of F.R.A.P. 4(a)(1)'s jurisdictional requirements, designed to ensure finality in litigation, and the fact that only in extraordinary circumstances are parties to be permitted to appeal after the jurisdictional time period has expired. Petitioners are arguing that appellants may

allow the initial thirty-day time period to expire, and jurisdiction in the Circuit Court with it, and blithely move for leave to appeal thereafter, offering merely "good cause".

The Circuit Courts have, within the discretion permitted in the Rule, distinguished between pre-expiration and post-expiration motions. The language of the Rule does not proscribe use of that discretion, nor does the language of the Rule *mandate* that the District Court consider "good cause" after thirty days has expired. It is not a clear abuse of discretion, in light of the strict jurisdictional requirements of F.R.A.P. 4(a)(1), for a Court to utilize "excusable neglect" as the standard for considering a motion for leave to file a late appeal filed after expiration of the initial thirty-day period, particularly where there are facts suggesting no good reason for extending the time to appeal.

### E. There Is No Conflict Among the Circuit Courts of Appeal As To Application Of The "Excusable Neglect" Standard To Motions For Leave To File a Late Appeal Filed After Expiration of the Initial Thirty-Day Period Within Which To Appeal

Petitioners contend there are six Circuit Courts of Appeals which disagree with the decision of the Ninth Circuit in this matter, and with *Oregon v. Champion Int'l Corp., infra.* (Petition, pages 22-26). However, review of the cases cited by Petitioners reveals virtually *no* conflict on the issue at hand.

Arguably, as stated by the Seventh Circuit in *Parke-Chapley Constr. Co. v. Cherrington, supra,* "the only case to reject the ruling in *Champion* ('good cause' standard applies only during the first thirty days following the entry of judgment) is *Scarpa v. Murphy,* [782 F.2d 300 (1st Cir. 1986)] and then only in dicta." 865 F.2d at 909.

In *Scarpa,* counsel for Appellant correctly addressed the notice of appeal and delivered it to the Post Office seven days *before* expiration of the thirty-day period following the entry of judgment. Thus, even though the notice of appeal was received by the Court *after* the thirty-day period had expired, the Appellant acted in a good faith effort to comply with the rule *within* the initial thirty-day period.

The First Circuit held that "There was no mistake by counsel, excusable or otherwise. Rather, there was inexcusable neglect by the Post Office to take more than five days (even though this includes a weekend) to transmit an adequately addressed letter three miles, and no basis for charging counsel for failing to think that more might be needed." *Scarpa,* 782 F.2d at 301. Although the *Scarpa* Court described its analysis as focusing on "good cause" rather than "excusable neglect", in effect, the standard it applied could have been characterized as either.

It was an extreme position to describe counsel's act of mailing the notice of appeal as lacking *any* neglect whatsoever. Delivering the notice of appeal personally to the Clerk of the Court "three miles away" would have guaranteed a timely appeal. However, the Court, in effect, found counsel's minimal "neglect" in choosing to mail the notice "excusable", since it was beyond counsel's

control to expect the Post Office to delay delivery beyond the thirty-day period. Since *Scarpa* involved extraordinarily clear efforts by appellant to appeal *before* expiration of the initial thirty-day time period (and appellant there had taken all the steps necessary to perfect its appeal within the thirty-day period) it is factually distinguishable from all of the other post-thirty-day cases, and should be limited to its facts.

Petitioners have chosen to characterize the *Scarpa* Court's reference to "good cause" as the *rule*, when in fact it is the limited exception. In any event, Petitioners (conceding here they had not even met to discuss the appeal during the first thirty days) cannot argue their circumstances are remotely comparable to the appellant's in *Scarpa*.

Appellants also cite to *Pontarelli v. Stone*, 930 F.2d 104 (1st Cir. 1991) for the proposition that there is a "split" in the Circuits as to which standard should apply during the period of time between the expiration of the 4(a) time appeal and sixty days following entry of judgment. *Pontarelli*, like *Scarpa*, is inapposite here, and does not stand for the proposition Petitioners suggest. The District Court in that case entered judgment against several police officers in an employment discrimination action. The officers filed a notice of appeal in a timely fashion, but mistakenly relied on the term *"et al."* in place of naming the individual police officers. The Appellants filed a Motion for Extension of Time to file an appeal, which the District Court denied. The First Circuit held that the failure to name the individual officers was not a result of "excusable neglect" and thus it was not an abuse of discretion

for the District Court to deny the motion for extension of time. The First Circuit in *Pontarelli* noted that:

> "The advisory committee note has been relied upon by the seven regional courts of appeals which adhere to the view that the 'good cause' standard is applicable exclusively to F.R.A.P. 4(a)(5) motions made during the thirty-day period for taking an appeal as a matter of right under F.R.A.P. 4(a)(1). . . . *Scarpa* required circumstances where there was no 'neglect,' excusable or otherwise, on the part of the would-be appellant. Until now, however, we have never been called upon to decide whether a 'good cause' analysis is appropriate as well where the F.R.A.P. 4(a)(5) extension was occasioned only by 'neglect' on the part of the would-be appellant. . . . The advisory committee note, no less than our decision in *Scarpa*, buttresses our reluctance to interpret 'excusable neglect' and 'good cause' as overlapping standards under amended rule 4(a)(5). . . . Where the need for an extension of time to file a notice of appeal results entirely from neglect attributable to the would-be appellant, as distinguished from forces beyond her control, amended rule 4(a)(5) *requires* a showing of 'excusable neglect.' "

*Id.* at 110-111 (citations omitted) (emphasis added).

Petitioners also incorrectly cite two other cases which purportedly did not follow the majority of the Circuits' interpretation of Rule 4(a)(5), *Weekley v. Jones*, 927 F.2d 382 (8th Cir. 1991) and *Cyrak v. Lemon*, 919 F.2d 320 (5th Cir. 1990).

In *Weekley, supra*, a criminal case, the District Court provided no reason from which the Eighth Circuit Court

of Appeals could determine which standard was applied. The case involved a *pro se* defendant, who was in prison, on medication, and suffered borderline mental retardation and paranoid schizophrenia, all factors which the Eighth Circuit found important in its decision. The order denying *habeas corpus* relief was entered on July 11, 1989 and the Appellant filed a request for extension of time to file notice of appeal on August 10, 1989. Thus, Appellant's request was received right on the thirtieth-day following judgment. The Eighth Circuit held that there was at least good cause, and even excusable neglect and there was therefore no reason to find the District Court abused its discretion, regardless of which standard the District Court applied (since the District Court had not specified which standard it had applied). *Id.* at 386. The *pro se* appellant in *Weekley* made every effort to comply with the jurisdictional requirements, despite his shortcomings, and therefore the Court found no abuse of discretion. The decision hardly stands for the proposition either standard is applicable after expiration of the initial thirty-day period.

In *Cyrak v. Lemon, supra,* the Fifth Circuit did not consider the application of F.R.A.P. Rule 4(a)(5) at all, but rather considered whether there was a timely appeal by a co-appellant under Rule 4(a)(3). In *Cyrak,* of three defendants, one filed a timely appeal on April 14, the last day permissible. Another defendant filed a motion to extend the time to file his appeal on May 15, and that motion was granted. When the first appeal was dismissed for lack of prosecution, that defendant and the remaining defendant filed appeals within 14 days after the appellant who obtained leave to file his late appeal. The *Cyrak*

Court was not reviewing the propriety of the District Court's order granting the motion for leave to file a late appeal. Instead, the Court was only asked to dismiss the cross-appeals under F.R.A.P. 4(a)(3), as they were filed well after the 14-day period from April 14, the date of the first appeal. The Circuit Court dismissed the latter appeals as untimely, and also indicated that the "good cause" demonstrated in the District Court by the appellant who sought leave did not inure to the benefit of the other appellants. *Id.* at 324. Since the *Cyrak* Court did not construe the varying standards, the case does not support Petitioners' contention that the Eighth Circuit has departed from the Ninth Circuit's application of F.R.A.P. 4(a)(5).

*Pryor v. Marshall*, 711 F.2d 63, 65 (6th Cir. 1983) dealt with whether a late notice of appeal could serve as a substitute for a motion for extension of time under Rule 4(a)(5) under the narrow facts of that case, not whether an untimely extension motion could be granted upon a showing of merely "good cause". In fact, the Sixth Circuit in *Pryor* dismissed the appeal for lack of jurisdiction, citing the very same Advisory Committee Notes (discussing the *excusable neglect* standard in F.R.A.P. 4(a)(5)) which Petitioners say cannot be followed:

> "The Notes of the Advisory Committee confirm that the Rule means what it says, and that the 'exception' permitted in Rule 4(a) is the excusable neglect provision of Rule 4(a)(5)."

*Id.* at 65.

Similarly, *Buggs v. Elgin, Joliet & Eastern Railroad*, 852 F.2d 318 (7th Cir. 1988) is inapposite. In *Buggs*, the appellants, who failed to appeal within thirty days after the original judgment, sought to appeal from an *amended* judgment, entered over *seven months* after the original judgment had been entered. The Seventh Circuit held appellants were attempting to use the grant of a Fed.R.Civ.P. 60(b) motion to circumvent F.R.A.P. Rule 4(a)(1) requiring an appeal within thirty days. In passing, the Court indicated that the appellant's apparent failure to appreciate that the Magistrate's Title VII judgment of October 3 was final, and immediately appealable would not have met the "excusable neglect" *or* "good cause" standards, and was "insufficient as a matter of law to warrant extension of the 30-day rule." *Id.* at 323.

In *Pratt v. McCarthy*, 850 F.2d 590 (9th Cir. 1988), the Court did not even address the "good cause" standard, as the motion for extension of time to file notice of appeal was filed more than thirty days after entry of judgment. The Ninth Circuit found that a misunderstanding between Appellant's attorneys over who would file the appeal did *not* constitute excusable neglect, and dismissed the appeal for lack of jurisdiction.

In *U.S. v. Twomey*, 845 F.2d 1132 (1st Cir. 1988) the First Circuit, in a post-*Scarpa* case, again addressing the Post Office's inexplicable delay in delivering mail in a case eerily similar to *Scarpa*, found that the District Court abused its discretion in denying a criminal appellant's Rule 4(b) motion for extension of time to file an appeal, since Appellant's counsel acted with due diligence, and any neglect was surely excusable, as the notice was mailed well within the thirty-day period but was not

received in a timely fashion due to the post office delay. *Id.* at 1134.

Petitioners also mistakenly contend *Olson v. National Broadcasting Co., Inc.*, 855 F.2d 1446 (9th Cir. 1988) contradicts the Ninth Circuit's *Oregon* decision. *Olson*, however, dealt with the issue of whether a trial court erred in granting additional time to file a notice of appeal when the party seeking the appeal initially filed a motion for extension of time *within* the first thirty days following entry of judgment. *Id.* at 1453-1454.

Indeed, as quoted from *Pontarelli* and *Scarpa* by Petitioners, "the original 'excusable neglect' standard . . . would be pared by gratuitous interpretation if the amendatory 'good cause' analysis were not *confined* to circumstances unsuited to the traditional 'excusable neglect' analysis." (Petition, page 26, citing to *Pontarelli*, at page 110, which in turn cites to *Scarpa*.)

Petitioner's interpretation would require that the two standards not be confined at all, but that the District Court could make *any* determination it wished during the entire sixty-day period beyond the entry of judgment. This is not what Congress intended when drafting the amendment to Rule 4(a)(5) as exhibited by the Committee Notes, nor is it the accepted interpretation of the Rule by the overwhelming majority of Circuit Courts considering the issue.

Petitioners cite *Pearson v. Gatto*, 933 F.2d 521 (7th Cir. 1991) for the proposition that the excusable neglect standard is applied strictly, but fail to acknowledge that *Pearson* is yet another example of a Circuit Court applying *excusable neglect* to a post-thirty-day motion for leave to

file a late appeal. In *Pearson*, the Seventh Circuit found excusable neglect largely because counsel's "overcommitment was due to an excess of public service and altruism, rather than mismanaged ambition or desire for financial gain." *Id.* at 524. There is no issue of altruism or public service here.

The District Court, on remand, should be permitted to determine whether Petitioners demonstrated "excusable neglect" in their motion to file a late appeal.

### F. Certiorari Should Not Be Granted Because The Ninth Circuit Was Without Jurisdiction to Hear the Underlying Appeal, As the District Court Extended Petitioners' Time to Appeal Beyond the Time Provided In F.R.A.P. 4(a)(5)

F.R.A.P. Rule 4(a)(5) provides, in pertinent part, as follows:

> "The district court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by this Rule 4(a). Any such motion which is filed before expiration of the prescribed time may be *ex parte* unless the court otherwise requires. Notice of any such motion which is filed after expiration of the prescribed time shall be given to the other parties in accordance with local rules. ***No such extension shall exceeed 30 days past such prescribed time or 10 days from the date of entry of the order granting the motion, whichever occurs later.***"

F.R.A.P. 4(a)(5) (emphasis added).

By order dated *October 28*, 1993, the District Court in this case granted Petitioner the Eckert Estate until *November 15*, 1993, or 75 days after the entry of judgment, to file a notice of appeal. However, that time period exceeded the District Court's authority. The District Court was thus without authority to grant an extension of time beyond November 12, 1993 (taking into account intermediate weekends and legal holidays from the date of the extension order.) The Notice of Appeal on behalf of the Eckert Estate was not filed until November *15*, 1993, exceeding the very latest day to file an appeal by three days. Accordingly, the Ninth Circuit was without subject matter jurisdiction to hear the appeal.

## III. CONCLUSION

The Petition at issue involves neither public policy nor significant novel issues of law. Nor does the Petition seek resolution of a bona fide dispute among the Circuit Courts of Appeal. Petitioners have been afforded due process, and must now face whether their tardy actions in bringing this case to appeal met the extraordinary circumstances required to depart from the strict jurisdictional requirements of F.R.A.P. Rule 4(a)(1) that an appeal be made within thirty days. The Petition should be denied, and proceedings on remand permitted to proceed.

Dated: September 28, 1995

Respectfully submitted,

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